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In the Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

CITY OF LINDEN, THE ASSESSOR OF LINDEN, AND RICHARD CHAIKEN, AGENT, SERVANT OR EMPLOYEE OF LINDEN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of New Jersey correctly held that a taxpayer is foreclosed from bringing an action for damages under 42 U.S.C. § 1983 to challenge the constitutionality of a state tax assessment because a state tax refund action is available, where the state refund action (a) may not apply to remedy the constitutional violation, (b) imposes an extraordinarily high burden of proof on the taxpayer, and (c) cannot offer relief against individual state officials who are responsible for the deprivation of constitutional rights.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner General Motors Corporation states that it has no parent companies. General Motors has several non-wholly owned subsidiaries, which are set forth in the Appendix, *infra*, 57a-63a.

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App., *infra*, 1a-13a) is reported at 143 N.J. 336, 671 A.2d 560. The opinion of the Appellate Division of the Superior Court of New Jersey (App., *infra*, 14a-30a) is reported at 279 N.J. Super. 449, 653 A.2d 568. The opinion of the Law Division of the Superior Court of New Jers y (App., *infra*, 31a-56a) is unreported.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

1. Petitioner General Motors Corporation owns and operates an automobile assembly plant in the City of Linden, New Jersey. In each of the years 1983, 1984, and 1985, GM challenged the property tax assessment on this facility through

the state judicial process.[1] Although the assessments were upheld (indeed increased) by the New Jersey Tax Court, GM's position was vindicated on appeal when the Appellate Division of the New Jersey Superior Court reversed the Tax Court decision and remanded for reconsideration. See *General Motors Corp.* v. *City of Linden*, No. A-583-91 (N.J. Super. Ct. App. Div. July 7, 1993), certif. denied, 134 N.J. 561 (1993).

The City increased GM's assessment in 1986 by means of an added assessment — this time raising the assessed value of the property by $17 million. App., *infra*, 3a. The Mayor of Linden subsequently acknowledged that the added assessment had been imposed to retaliate against GM for its protests against the prior tax increases; he stated (with astonishing candor) that "'[t]he additional increased assessment was placed on General Motors' plant because [GM] filed the tax appeal.'" PA 34A.[2] The Mayor's admission was consistent with the highly irregular methodology used to arrive at the $17 million increase.[3] GM

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[1] Under New Jersey law, a taxpayer may challenge a property tax assessment — after paying the disputed tax — by appealing to the county board of taxation. N.J.S.A. 54:4-63.11. If not satisfied with the decision of the county tax board, the taxpayer may appeal, in turn, to the New Jersey Tax Court, the Appellate Division of the Superior Court, and the New Jersey Supreme Court. N.J.S.A. 2B:13-3(b), 2B:3-4. "If the taxpayer succeeds at any level, the taxing district must refund the excess taxes plus five-percent interest." App., *infra*, 12a.

[2] Citations in this form refer to the petitioner's Appendix in the Appellate Division. Citations to "PSA" refer to petitioner's Supplemental Appendix in the Appellate Division.

[3] In testimony before the Union County Board of Taxation, a consultant hired by the City stated that he had guessed that GM's facility was worth $55 per square foot and that he multiplied that

accordingly filed a state-law challenge to the 1986 added assessment as excessive. That challenge is now pending in New Jersey Tax Court.

2. The New Jersey Tax Court is "an inferior court of limited jurisdiction" (N.J.S.A. 2A:3A-3), which is restricted in the claims it may entertain and in the relief it may provide. The court's "primary function" is to "review decisions of the various county boards of taxation." *Exxon Corp.* v. *Township of East Brunswick*, 192 N.J. Super. 329, 335, 470 A.2d 5, 9 (App. Div. 1983), certif. denied, 96 N.J. 312 (1984). In cases in which a tax appeal is joined with another claim over which the Tax Court does not have jurisdiction, New Jersey law authorizes the Tax Court judge hearing the case to be assigned temporarily to the Law Division of the Superior Court, which is the state trial court of general jurisdiction, for purposes of deciding both claims. *Alid, Inc.* v. *Township of North Bergen*, 89 N.J. 388, 446 A.2d 126 (1981).

When a property assessment is challenged in the Tax Court, the issue before the court is not whether the assessor used an illegal or unconstitutional method of assessment; instead, the court may determine *only* whether the valuation selected by the assessor fairly reflects the value of the taxpayer's property. Under this regime — as the City of Linden has acknowledged (see pages 13-14, *infra*) — the

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number by the facility's total square footage. In choosing this figure the consultant conducted no cost comparison, issued no appraisal report, and offered no justification of any kind for his analysis. PSA 659-663. The city tax assessor, who stated that he simply accepted the valuation number supplied by the consultant (PSA 683), acknowledged that the only written record supporting the $17 million figure was "some scribbling on napkins" done while the assessor and the consultant drank coffee one afternoon. PSA 682. In contrast, GM submitted reports from three expert real estate appraisers demonstrating the unprofessional and irregular nature of the 1986 added assessment. PSA 939-1020.

constitutionality of the assessment method, and the assessor's motivation in making the assessment, are irrelevant. The sole relief available to an aggrieved taxpayer in Tax Court is a revision of the taxable value of his property and a refund of any excess taxes paid if the assessment exceeds the property's taxable value. See N.J.S.A. 54:51A-6; *Sands* v. *Township of East Windsor*, 9 N.J. Tax 652, 655 (Law Div. 1988).[4] Even in cases where a property tax assessment violates the federal Constitution, the remedy for claims brought in Tax Court "is to strike the Township's assessment * * * and restore the [prior] assessed valuation." *Township of West Milford* v. *Van Decker*, 120 N.J. 354, 365, 576 A.2d 881, 887 (1990).[5]

There are additional limits on remedies available in the Tax Court. Under New Jersey law, no relief is provided to a complaining taxpayer if the assessment falls within a zone of reasonableness; an assessment will not be disturbed so long as it does not exceed the taxable value of the property by more than 15%. N.J.S.A. 54:3-22, 54:51A-6, 54:1-35a. As a consequence, even if the assessor uses a plainly unconstitutional method of valuation — for example, if he chooses to assess black property owners at the upper end of the zone of reasonableness, while assessing white owners at

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[4] The jurisdiction of the Tax Court was expanded in 1992 to permit the award of "actual direct economic damages suffered by the taxpayer" in cases where "an employee of the Division of Taxation knowingly disregards any tax law, any provision of this subtitle, or any regulation promulgated thereunder, in the collection of any tax." N.J.S.A. 54:51A-23. This statute has no application here, because it reaches only "employee actions taken on or after" July 1, 1993. N.J. P.L. 1992, c. 175, § 42(e). In addition, the statute does not authorize the Tax Court to award damages for violations of federal law.

[5] The Tax Court, however, may pass upon the constitutionality of a tax statute and provide relief if the tax is held invalid. See *Weisbrod* v. *Township of Springfield*, 1 N.J. Tax 583, 590 (1980).

the lower end — the disfavored taxpayers will not be entitled to relief if the assessments do not in fact exceed the taxable value of their properties by more than 15%.

The New Jersey Tax Court also imposes an unusually high burden of proof on taxpayers: assessments are presumed correct, and "[t]he strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be 'definite, positive and certain in quality and quantity to overcome the presumption.'" *Pantasote* v. *City of Passaic*, 100 N.J. 408, 413, 495 A.2d 1308, 1310 (1985), quoting *Aetna Life Ins. Co.* v. *Newark*, 10 N.J. 99, 105, 89 A.2d 385, 387 (1952). This presumption is applied even if the taxing authority "utilized a flawed valuation methodology, so long as the quantum of the assessment is not so far removed from the true value of the property or the method of assessment itself is so patently defective as to justify removal of the presumption." *Transcontinental Gas Pipe Line Corp.* v. *Bernards Township*, 111 N.J. 507, 517, 545 A.2d 746, 751 (1988). And because the taxing jurisdiction is the only permissible defendant in Tax Court, assessors, their consultants, and other municipal officials cannot be held personally liable for constitutional violations. See N.J.S.A. 54:3-21; *Kurtz* v. *Burlington County Board of Taxation*, 4 N.J. Tax 343, 348 (1982).

3. GM maintained that the 1986 increase in its property assessment — which singled it out for a retaliatory tax increase — violated its rights under the Due Process and Equal Protection Clauses of the U.S. Constitution.[6] Because

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[6] Respondents have never denied that GM's factual allegations, if proved, would make out a violation of the Due Process and Equal Protection Clauses. See generally *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County*, 488 U.S. 336 (1989); *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *423 South Salinas Street, Inc.* v. *City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63 (1986), cert. denied, 481 U.S. 1008 (1987).

the limitations on the Tax Court's jurisdiction precluded the complete vindication of those federal rights in Tax Court proceedings, GM initiated this separate action against the City of Linden, the City's tax assessor, and the consultant who advised the assessor regarding the revised assessment. GM brought the suit under 42 U.S.C. § 1983 in the Law Division of New Jersey Superior Court. To avoid duplicative proceedings, GM suggested that this Section 1983 suit be consolidated with the pending Tax Court challenge. See App., *infra*, 23a-24a.

The Law Division dismissed GM's constitutional claims, holding that it had no jurisdiction to entertain an action challenging a state tax under Section 1983. App., *infra*, 33a-42a. The court reasoned that an action under Section 1983 is precluded if New Jersey provides a state-law remedy for constitutional violations involving state taxation that is "adequate, speedy and efficient." *Id.* at 38a. Noting that GM's suit in Tax Court sought "a lowering of its assessment and a return of monies it claims are due to it for overassessment" (*id.* at 38a), the Law Division concluded that "constitutional issues could and should be addressed in the tax appeal process." *Id.* at 41a. The court therefore held that GM was limited to its Tax Court remedies.[7]

On appeal, the Appellate Division of the Superior Court reversed. App., *infra*, 14a-30a. Noting the limited jurisdiction of the Tax Court (see *id.* at 19a), the Appellate Division observed that

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[7] Alternatively, the court went on to hold that the City's tax assessor and his consultant are entitled to absolute immunity under Section 1983 and that the City of Linden could not be liable for any Section 1983 violation by the individual defendants. App., *infra*, 42a-55a. These holdings were reversed by the Appellate Division and were not addressed by the New Jersey Supreme Court. They are not at issue here.

> the Tax Court lacked the authority to award the full range of remedies authorized by §1983. Although the Tax Court could correct an assessment made in violation of federal constitutional rights, * * * its jurisdiction would not extend to awarding compensatory and punitive damages against a tax assessor or other public official who had violated a taxpayer's constitutional rights or granting equitable relief broader in scope than the simple correction of an erroneous tax assessment.

Id. at 19a-20a. The court therefore held that a Tax Court appeal was not an adequate substitute for an action under Section 1983. The court added that "if we were to hold that a § 1983 action is not maintainable in a state court solely because an alleged deprivation of constitutional rights relates to a tax assessment, it would mean that a tax assessor could engage in a practice of racially discriminatory tax assessments without being subject to personal liability." *Id.* at 22a. The court concluded by directing that the Section 1983 action in the Law Division be assigned to the Tax Court judge hearing the related tax assessment appeal and that the judge be assigned to the Law Division of the Superior Court for purposes of deciding the consolidated cases. Moreover, the court stated that the judge could stay proceedings in the Section 1983 action until the tax appeal had been completed. *Id.* at 23a-24a.

The New Jersey Supreme Court then granted review and reversed in turn (App., *infra*, 1a-13a), holding that the case was controlled by this Court's decision in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), which was decided after the Appellate Division had issued its opinion. Although the New Jersey Supreme Court found the decision in *National Private Truck Council* "somewhat enigmatic" (App., *infra*, 6a), it concluded

> that the [Supreme] Court has determined that Congress did not intend claims involving state tax administration to be actionable under section 1983 in state or federal court,

> whether those claims arise from alleged violations of the interstate commerce or due process clauses. The United States Supreme Court has recognized an exception under section 1983 for challenges to a state tax system when a state provides a plain, adequate, and complete remedy.

Id. at 6a.

The New Jersey Supreme Court then turned to the question whether proceedings in the New Jersey Tax Court offer an adequate alternative to Section 1983. It began by observing that "courts consistently have analyzed the adequacy of the remedy in terms of the process provided by the state." App., *infra*, 10a. To satisfy the adequacy requirement, the court continued, "[a] state remedy need not be identical to section 1983 remedies. * * * It need not be the best remedy available, * * * the most convenient remedy, * * * or equal to or comparable with federal remedies * * * ." *Id.* at 10a-11a.

Viewed against this background, the New Jersey Supreme Court held that New Jersey's state remedy is adequate. The court below found it crucial that either the county board of taxation or the Tax Court may correct an excessive assessment, and that the taxpayer may obtain a "refund of the excess taxes" if the assessment is found improper. App., *infra*, 12a. Thus, the court measured the adequacy of the remedy solely be whether a refund was available. In reaching this conclusion, the court "recognize[d] that GM alleges that defendants intentionally discriminated against it in violation of GM's substantive due process rights," but nevertheless held that "GM's pending appeal in the Tax Court provides an adequate remedy for any alleged violation of its federal rights. In that proceeding, GM may also seek to introduce evidence to overcome the presumptive validity of the assessment." *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical importance: in what circumstances may a taxpayer invoke 42 U.S.C. § 1983 to bring a challenge in state court to the constitutionality of a state tax? We submit that the New Jersey Supreme Court's answer to that question rests on a fundamental misunderstanding of this Court's recent decision in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995). The Court there held that Section 1983 is unavailable to a state taxpayer only when the state provides an *adequate* alternative remedy. In this case, however, the court below held that the preclusive rule of *National Private Truck Council* applied — and therefore found that a taxpayer could not proceed under Section 1983 — where the allegedly adequate state remedy offers no relief at all for certain constitutional violations, imposes an extraordinary burden of proof on the taxpayer, and cannot be pursued against the individual state officials who are responsible for violating the federal Constitution.

As a consequence, under the New Jersey Supreme Court's holding, a state taxing official who, for example, engages in intentional racial discrimination cannot be held liable either under state law *or* under Section 1983; thus, a tax assessor who imposes added assessments on blacks to force them out of a community is entirely shielded from civil liability. Similarly, under the holding below a mayor may order increased assessments for anyone who opposes his reelection without fear of personal liability. Or — as in this case — the mayor or city assessor may decide that anyone who invokes his right to challenge a property tax assessment will have that assessment increased as punishment. The *only* remedy in New Jersey for these gross and intentional constitutional violations is a tax refund, and even that remedy may be unavailable if the final assessment (however unconstitutionally selected) falls within some acceptable zone of reasonableness.

Because the New Jersey Supreme Court's ruling guts the principal remedy that Congress created to deter unconstitutional state action, because the decision below is manifestly inconsistent with *National Private Truck Council* and the decisions upon which that case relied, and because it is enormously important that the Court clarify the rules governing constitutional challenges to state taxation, further review is warranted.

A. The Court Below Endorsed A Regime That Does Not Provide Adequate Remedies For The Deprivation Of Federal Constitutional Rights

1. This Court has held that a state court cannot refuse to entertain "one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants." *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990).[8] At the same time, however, the Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council*, 115 S. Ct. at 2354.

These comity principles initially were articulated in cases where taxpayers sought injunctive or declaratory relief against the application of a state tax, and were "based upon the traditional doctrine that courts of equity will stay their hand when remedies at law are plain, adequate, and complete." *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 108 (1981). See *id.* at 127 (Brennan, J., concurring in the judgment).[9] This rule was codified in the

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[8] See, *e.g.*, *Felder* v. *Casey*, 487 U.S. 131, 143, 151 (1988); *Martinez* v. *California*, 444 U.S. 277, 284 (1980).

[9] See, *e.g.*, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 298 (1943); *State Railroad Tax Cases*, 92 U.S. 575, 614 (1876); *Dows* v. *Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

Tax Injunction Act, 28 U.S.C. § 1341, which provides that federal district courts may not enjoin the collection of a state tax "where a plain, speedy and efficient remedy may be had in the courts of such State." More recently, the Court held in *Fair Assessment* that related principles of comity bar federal courts "from granting damages relief in such cases" (454 U.S. at 107) — although the Court again emphasized that this rule of preclusion applies *only* if the state remedies are "plain, adequate, and complete." *Id.* at 116.

In *National Private Truck Council*, the Court held that similar principles may preclude recourse to Section 1983 in *state* court, explaining that "the background presumption that federal law generally will not interfere with administration of state taxes leads us to conclude that Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law." 115 S. Ct. at 2355. The Court found this interpretation of Section 1983 "supported not only by the background principle of federal non-interference discussed in *Fair Assessment*, but also by the principles of equitable restraint discussed at length in that case." *Id.* at 2356. In reaching this conclusion, however, the Court once more emphasized that the State must provide a meaningful alternative remedy to Section 1983; the Court declared no fewer than *13 times* in its brief opinion that use of Section 1983 is precluded only "when an *adequate* remedy is available under state law." *Ibid.* (emphasis added). See *id.* at 2354-2357 & n.6. The Court had no occasion to address the nature of this adequacy requirement in *National Private Truck Council* because it was undisputed that the State "offered an adequate remedy in the form of refunds." *Id.* at 2355. Refunds were the only form of relief requested by the taxpayers for the constitutional violation in that case; they did not seek compensatory damages, nor did they attempt to hold state taxing officials personally liable for the deprivation of constitutional rights.

2. The issue of the adequacy of the state remedy is squarely presented here, and the New Jersey Supreme Court's resolution of that issue cannot be reconciled with the purposes of Section 1983 or the principles that underlay *National Private Truck Council*. The nature of an adequate state remedy is illuminated by several sources, including equitable "'principles articulated even before enactment of § 1983'" (*National Private Truck Council*, 115 S. Ct. at 2356, quoting *Fair Assessment*, 454 U.S. at 115) and decisions interpreting the Tax Injunction Act.[10] These sources establish that in assessing the adequacy of the state remedy, the "issue is 'whether the State affords full protection to the federal rights.'" *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 513 (1981), quoting *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625 (1946). At a minimum, the taxpayer in such a suit must have the opportunity to "assert his federal rights and secure a review of them by this Court" (*Great Lakes*, 319 U.S. at 301; see *Rosewell*, 450 U.S. at 513); for federal relief to be unavailable, the State must "provide[ ] the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax," and it must offer meaningful relief when the taxpayer's complaint is well taken. *Rosewell*, 450 U.S. at 514, 515 n.9 (citation omitted). See *California* v. *Grace Brethren Church*, 457 U.S. 393, 411 (1982).

The New Jersey regime falls far short of satisfying this requirement. The state remedy plainly is inadequate here

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[10] The Court has indicated that the "plain, speedy and efficient" formulation of the Tax Injunction Act does not differ significantly from the pre-Act "plain, adequate, and complete" standard that governed actions seeking equitable relief. *Fair Assessment*, 454 U.S. at 116 n.8. But see *id.* at 129 n.15 (Brennan, J., concurring in the judgment) ("The Tax Injunction Act sets forth a more deferential standard by which to evaluate the adequacy of the state remedy").

because it is not really aimed at the correction of constitutional violations at all. The issue before the New Jersey Tax Court is *not* whether the assessor acted unconstitutionally in making the assessment, much less whether he knowingly violated the Constitution; instead, the *only* question in the state proceeding is whether the valuation number selected by the assessor fairly reflects the value of the taxpayer's property (or, more precisely, whether it falls somewhere within a range of reasonableness). Cf. *Rosewell*, 450 U.S. at 521 n.26. The nature — and the constitutional validity — of the assessment method, and the assessor's motivation for selecting a particular assessed value, are wholly irrelevant.

Thus, as the Appellate Division explained, "[a]lthough the Tax Court could correct an assessment made in violation of federal constitutional rights, * * * its jurisdiction would not extend to * * * granting equitable relief broader in scope than the simple correction of an erroneous tax assessment." App., *infra*, 19a-20a. See N.J.S.A. 54:51A-6; *Township of West Milford* v. *Van Decker*, 120 N.J. 354, 365, 576 A.2d 881, 886-887 (1990); *Sands* v. *Township of East Windsor*, 9 N.J. Tax 652, 654-655 (Law Div. 1988) (plaintiffs withdrew complaint filed with Tax Court when they "determined that they were not contesting the assessed valuation of their property"). Indeed, counsel for the City of Linden conceded this point during argument before the Union County Board of Taxation, stating that

> [a]s I understand the law, and I think the Board will agree, they [GM] have the burden of going forward with evidence that is definite and responsive and certain in quality so that they can demonstrate to you what the correct assessment is, since they allege that the present assessment is incorrect.
>
> *The one thing that is not in issue, as I understand the law, is how the assessor arrived at the assessment.* If the

> assessor arrived at the assessment with a Ouija board, * * * it would still be the burden of this taxpayer to come in here and tell you that the number was too high, too low, whatever.

PA 94A (emphasis added).

As a consequence, in many cases the New Jersey system provides no remedy at all even for blatant and palpable constitutional violations. Cf. *Hillsborough*, 326 U.S. at 624-625 (remedy is inadequate where availability of relief is uncertain). If an assessor unconstitutionally selects out black homeowners for new and increased assessments, for example — or (as here) if he unconstitutionally increases assessments to retaliate against taxpayers who previously have challenged his decisions — the taxpayers may have no recourse so long as the number chosen by the assessor falls within an acceptable zone of reasonableness.[11]

In contrast, Section 1983 would provide meaningful relief that would cure the constitutional violation. At a minimum, Section 1983 would offer the taxpayer nominal damages, the

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[11] The New Jersey Supreme Court acknowledged that "GM alleges that defendants intentionally discriminated against it" but nevertheless held — despite the deficiencies in the New Jersey refund scheme outlined above — that "GM's pending appeal in the Tax Court provides an adequate remedy for any alleged violation of its federal rights." App., *infra*, 12a. The court went on to state that it "need not reach the question whether discrimination, based on race, religion, gender, or the like, could constitute a violation of the taxpayer's constitutional rights. The issue is not before us. Suffice it to state that we do not read the decisions of the United States Supreme Court as legitimizing any form of invidious discrimination." *Ibid.* Despite these empty assurances, the court below did not identify any aspect of the regime for challenging state taxes that would provide special remedies for those sorts of equal protection violations, and such a suggestion would, in any event, find no support in the New Jersey statutes.

mechanism by which "the law recognizes the importance to organized society that these [constitutional] rights be scrupulously observed." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). See *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986). Absent such a remedy in the New Jersey tax appeals process, constitutional violations may go entirely unredressed, and the federal rights at issue could not be "'preserved unimpaired.'" *Fair Assessment*, 454 U.S. at 109, quoting *Boise Artesian Water Co.* v. *Boise City*, 213 U.S. 276, 282 (1909).

Moreover, while the plaintiff in a Section 1983 action ordinarily must establish his case under a preponderance of the evidence standard (see, *e.g.*, *Stone* v. *City of Chicago*, 738 F.2d 896, 900 (7th Cir. 1984)), the New Jersey tax appeals process imposes a different and much *higher* burden on a taxpayer who challenges his assessment. As the court below recognized (see App., *infra*, 12a), in New Jersey Tax Court the assessment is presumed correct, and "[t]he strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be 'definite, positive and certain in quality and quantity to overcome the presumption.'" *Pantasote Co.* v. *City of Passaic*, 100 N.J. 408, 413, 495 A.2d 1308, 1310 (1985), quoting *Aetna Life Ins. Co.* v. *Newark*, 10 N.J. 99, 105, 89 A.2d 385, 387 (1952). This elevated standard "allocate[s] the risk of error" to the taxpayer (*Addington* v. *Texas*, 441 U.S. 418, 423 (1979)). Thus, while a standard like that applicable in New Jersey Tax Court ordinarily is used to "protect particularly important *individual* interests" (*id.* at 424 (emphasis added)); see *Santosky* v. *Kramer*, 455 U.S. 745, 756 (1982)), in New Jersey it often will have the ironic effect of making it impossible for taxpayers to prevail on their meritorious constitutional claims. In this situation, recourse to Section 1983 is essential because the "asserted federal right might otherwise be lost." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976).

3. The New Jersey system is defective for yet another important reason. To be "adequate," a state remedy must offer more than a cure for the immediate effects of a constitutional violation. That is clear from *National Private Truck Council* itself, which indicated that even federal injunctive relief will be available where the state's legal remedy does not preclude repetitive constitutional violations. See 115 S. Ct. at 2357 n.6. That conclusion was grounded on the historical recognition that federal injunctive remedies may be invoked where "enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or * * * throw a cloud upon the title" of real estate. *Dows*, 78 U.S. (11 Wall.) at 110. See *Grace Brethren Church*, 457 U.S. at 412; *Rosewell*, 450 U.S. at 517, 518 n.22.

This requirement means that a state remedy, if it is to serve as an adequate substitute for Section 1983, must act to preclude or deter repeated constitutional violations. The state tax refund remedy is woefully deficient in this respect. As we noted above, under the New Jersey regime the taxpayer is entitled only to a refund of excessive taxes, payable by the city or county. Tax assessors and their consultants cannot be held personally liable for constitutional violations; indeed, an assessor may not even be a party to a property tax challenge in Tax Court. See *Pleasantville City* v. *California Apartment Assocs.*, 4 N.J. Tax 519, 523 (1982); N.J.S.A. 54:3-21 (only municipality and taxing district may file tax appeals).

This regime plainly is inadequate and ineffective in accomplishing one of the principal purposes of Section 1983: deterrence. There is nothing to discourage an assessor from engaging in one (or, for that matter, repeated) constitutional violations. If the taxpayer challenges the violation and prevails in Tax Court, the taxing jurisdiction will (at most) have to refund taxes to which it was not entitled in the first place. A taxing jurisdiction and its assessor therefore have nothing to lose by engaging in a pattern of unconstitutional

violations — which may explain why the City of Linden repeatedly has over-assessed petitioner.

In fact, money damages — the only remedy sought by GM in this case — may be effective as a deterrent only if a cause of action is available directly against the state official responsible for the constitutional violation. This Court has recognized that damages "recoverable against individuals" are "a more effective deterrent" than a remedy against the government; "[i]t is almost axiomatic that the threat of damages has a deterrent effect, * * * surely particularly so when the individual official faces personal financial liability." *Carlson* v. *Green*, 446 U.S. 14, 21 (1980). See *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981). For just this reason, Section 1983 allows for the imposition of damages liability directly on individual state and local officials, subject to immunity defenses recognized under federal law. See *id.* at 269-270; *Martinez*, 444 U.S. at 283-284 & n.8. Section 1983 also provides for punitive damages: "[b]y allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional violations." *Newport*, 453 U.S. at 269. See *Smith* v. *Wade*, 461 U.S. 30, 36 n.5 (1983); *Stachura*, 477 U.S. at 306 n.9, 308 n.11. Against this background, the *sole* remedy available in New Jersey's Tax Court — a refund payable by the city or county — is not an adequate substitute for the remedies granted by Congress in Section 1983.

This conclusion is confirmed by a consideration of the policy underlying Section 1983 — an inquiry that is important because *National Private Truck Council* is, after all, an interpretation of that statute. "[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983." *Newport*, 453 U.S. at 268. See *Stachura*, 477 U.S. at 307; *Smith*, 461 U.S. at 49. And while the Court concluded in *National Private Truck Council*

that Congress did not intend the statute to run roughshod over the mechanisms of state tax administration, there is every reason to believe that Congress sought both to remedy and to deter constitutional violations involving state taxation. "By its terms [Section 1983] gave a federal cause of action to prisoners, *taxpayers*, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State." *Fair Assessment*, 454 U.S. at 103-104 (emphasis added). Indeed, 42 U.S.C. § 1981, which was enacted in 1868, just three years prior to Section 1983, expressly provides that "[a]ll persons * * * shall be subject to like punishment, pains, penalties, *taxes*, licenses, and exactions of every kind, and to no other" (emphasis added).[12] It is unlikely that Congress would have considered a state remedy an adequate substitute for Section 1983 if it did not punish and deter constitutional violations involving state taxation.

There is, as well, no ground to doubt that Congress viewed the availability of compensatory relief against individual wrongdoers as an important part of an adequate and effective remedy — an issue that was not involved in *National Private Truck Council*, where the plaintiff advanced claims only for injunctive and declaratory relief under Section 1983. See 115 S. Ct. at 2355. In fact, the pre-Section 1983 law upon which the Court relied in *National Private Truck Council* regarded the availability of an action against taxing officers for compensatory damages to be an important part of the adequate legal remedy that precluded federal injunctive relief: "[i]f the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after [the tax] was paid, against the officer or the city to recover back the money, *or he might have prosecuted either for his damages*." *Dows*, 78 U.S. (11 Wall.) at 112 (emphasis added). This

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[12] The reference to taxes in Section 1981 was added in 1870, the year before enactment of Section 1983. See *Fair Assessment*, 454 U.S. at 123 n.9 (Brennan, J., concurring in the judgment).

means that, "[i]n enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the government officials responsible for those deprivations." *Felder* v. *Casey*, 487 U.S. 131, 153 (1988).[13]

4. While recourse to Section 1983 is essential to the preservation of federal rights, invocation of the statute will not interfere at all with state tax administration. In other settings, the Court has withheld federal equitable relief out of fear that "'state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed * * * .'" *Fair Assessment*, 454 U.S. at 109 n.6, quoting *Perez* v. *Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). The Court similarly has held that an action in federal court for money damages is unavailable in circumstances where taxpayers would be able to obtain a federal judgment "without first permitting the State to rectify any alleged impropriety" and where "the very maintenance of the [federal] suit itself would intrude on the enforcement of the

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[13] The Court in *Fair Assessment* concluded that taxpayers could not seek recovery *in federal court* from individual state officers under Section 1983. 454 U.S. at 113-114. But that holding is far from dispositive here. The Court in *Fair Assessment* was concerned that the federal court damages action would allow taxpayers to circumvent state remedies and interfere with enforcement of the state taxing scheme. See *ibid*. As we explain below, however, that concern has no bearing in this case. In fact, the Court in *Fair Assessment* noted with evident approval that the taxpayers in that case could assert their Section 1983 claim in state court. See *id*. at 116-117. The New Jersey Supreme Court's decision rejects this Court's assumption.

state scheme." *Fair Assessment*, 454 U.S. at 114. But those concerns have no application in a case like this one.

Here, GM has not attempted to circumvent state procedures; to the contrary, it has pursued its challenge to the assessment under state law through the state administrative and judicial processes, where its action remains pending before a Tax Court judge who could be assigned to the Law Division. See *Alid*, *supra*; page 3, *supra*. Nor will maintenance of GM's Section 1983 action interfere either with the collection of state taxes (GM long ago paid its 1986 property taxes) or with the state remedial scheme. Indeed, as the Appellate Division noted below, GM's Section 1983 action may be assigned to the Tax Court judge who is hearing the tax assessment appeal, and proceedings in the Section 1983 suit may be stayed pending completion of that appeal. See App., *infra*, 23a, 31a. Cf. *Fair Assessment*, 454 U.S. at 136-137 (Brennan, J., concurring in the judgment). In these circumstances, the state interest in effective tax administration is not advanced in any respect by precluding resort to Section 1983. Cf. *Deakins* v. *Monaghan*, 484 U.S. 193, 206 (1988) (White, J., concurring) ("To permit dismissal of a claim for damages when such relief may not be obtained in any pending state proceeding is surely not required by any notions of comity.")

5. Against this background, it is plain that the decision of the Supreme Court of New Jersey simply gives state taxing officials a license to violate the federal Constitution. It entirely frustrates the federal interest in the deterrence and punishment of constitutional violations by state officials that is expressed in Section 1983. It assures that in many cases taxpayers will obtain *no remedy at all* for the deprivation of federal constitutional rights. And while purporting to interpret Section 1983, it endorses a regime where the focus of the court's inquiry is the state-law question of valuation rather than the federal-law question whether the Constitution

was violated. This manifest misinterpretation of *National Private Truck Council* should not stand.

B. The Issue Presented Here Is An Important And Recurring One That Warrants Review

The issue presented here warrants this Court's review. *First*, the inadequacies in New Jersey's tax remedies are found in state systems across the Nation. See, *e.g.*, *Cook* v. *Tax Appeals Tribunal*, 635 N.Y.S.2d 355 (App. Div. 1995) (plaintiff challenging tax assessment must present clear and convincing evidence); *In re Cook County Collector*, 229 Ill. App.3d 138, 593 N.E.2d 878 (Ct. App. 1992) (same); Conn. Gen. Stat. Ann. § 7-250 (reviewing court may only confirm or alter tax assessment, and no damages suit permitted against tax officials); Va. Code Ann. §§ 58.1-1821-1822, 58.1-1825-1826 (only state tax department, not state taxing officials, "shall be named as defendant" in suit challenging tax assessment, and remedy is that "assessment be corrected").

Second, constitutional challenges to state taxation are brought with great frequency — and, if anything, are likely to become more common at a time when state and local budgets are tight and taxing officials are experimenting with novel (and in some cases constitutionally suspect) forms of taxation. See Rothfeld, *Section 1983: The Civil Rights Alternative to Constitutional Challenges*, State Tax Notes, March 21, 1994, at 751, 752. This point is proved by the volume of recent cases in which state taxpayers have invoked Section 1983. See *Jade Aircraft Sales, Inc.* v. *Crystal*, 236 Conn. 701 (1996).[14] In saying this, we recognize that in

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[14] Prior to the decision in *National Private Truck Council*, courts in a number of states permitted Section 1983 suits to proceed so long as the taxpayer first exhausted state remedies. See, *e.g.*, *McManus* v. *Iowa*, 499 N.W.2d 726, 728 (Iowa 1993), cert. denied, 114 S. Ct. 580 (1993); *Dean* v. *State*, 826 P.2d 1372, 1377-1378 (Kan.), cert. denied, 504 U.S. 973 (1992); *Zarda* v.

many cases state remedies will be entirely adequate; indeed, in the vast majority of cases, as in *National Private Truck Council* itself, taxpayers request only refunds from state

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State, 826 P.2d 1365, 1371-1372 (Kan.), cert. denied, 504 U.S. 973 (1992); *Allison* v. *Board of County Commissioners*, 737 P.2d 6, 15 (Kan. 1987); *Nutbrown* v. *Munn*, 811 P.2d 131, 138-139 (Or. 1991), cert. denied, 502 U.S. 1030 (1992); *Bloomingdales by Mail* v. *Huddleston*, 848 S.W.2d 52 (Tenn. 1992), cert. denied, 113 S.Ct. 3002 (1993); *Hogan* v. *Musolf*, 471 N.W.2d 216 (Wisc. 1991), cert. denied, 502 U.S. 1030 (1990); *Raschke* v. *Blaucher*, 491 N.E.2d 1171 (Ill. App. 1986); *Harlan Sprague Dawley, Inc.* v. *Indiana Dept. of State Revenue*, 583 N.E.2d 214, 224-225 (Ind. Tax Ct. 1991). Other courts allowed Section 1983 suits to proceed without discussion of an exhaustion requirement. See, *e.g.*, *Arkansas Writers' Project* v. *Ragland, Inc.*, 738 S.W.2d 402, 403 (Ark.), aff'd on other grounds, 481 U.S. 221 (1987); *Porter* v. *Treasurer & Collector*, 431 N.E.2d 934 (Mass. 1982); *Burrell* v. *Mississippi State Tax Comm'n*, 536 So.2d 848, 863 (Miss. 1988); *Marx* v. *Truck Renting & Leasing Ass'n*, 520 So.2d 1333, 1346 (Miss. 1988); *Brower* v. *Wells*, 690 P.2d 1144 (Wash. 1984); *Neiman Marcus Group, Inc.* v. *Meehan*, 1991 Conn. Super. LEXIS 2135 (Conn. Super. Ct. Sept. 19, 1991); *Satellink of Chicago* v. *City of Chicago*, 523 N.E.2d 13 (Ill. App. 1988); *Beverly Bank* v. *Board of Review*, 453 N.E.2d 96 (Ill. App. 1983); *Uretsky* v. *Baschen*, 361 N.E.2d 875 (Ill. App. 1977); *Department of Treasury* v. *Campbell*, 411 N.W.2d 722, 723 (Mich. Ct. App. 1987); *Holden Arboretum* v. *City of Kirtland*, 483 N.E.2d 167 (Ohio Ct. App. 1984). Still other States refused to entertain Section 1983 tax challenges. See, *e.g.*, *Zizka* v. *Water Pollution Control Auth.*, 490 A.2d 509, 513 (Conn. 1985); *Backus* v. *Chilivis*, 224 S.E.2d 370 (Ga. 1976); *Stufflebaum* v. *Panethiere*, 691 S.W.2d 271 (Mo. 1985); *North Dakota* v. *Quill Corp.*, 500 N.W.2d 196 (N.D.), cert. denied, 114 S. Ct. 173 (1993); *Linderkamp* v. *Bismarck School Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986); *Spencer* v. *South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), aff'd by an equally divided Court, 471 U.S. 82 (1985); *Johnston* v. *Gaston County*, 323 S.E.2d 381 (N.C. App. 1984).

coffers and do not seek to hold taxing officials personally liable for constitutional violations. But state remedies are most likely to be inadequate in those important cases where state officials should be held personally liable because (as is alleged in this case) they engaged in intentional deprivations of settled constitutional rights. And it is, in any event, essential both for taxpayers and for the states that the rules governing state tax litigation be clear and unambiguous.

Third, while there sometimes may be a temptation to regard tax cases as principally involving commercial disputes that fall outside the central policy of Section 1983 (cf. *National Private Truck Council*, 115 S. Ct. at 2357 (Kennedy, J., concurring)), that does not reflect the reality of state-tax challenges. Taxpayers have made credible allegations that state tax laws have been applied in a manner that discriminates on the basis of race,[15] that suppresses free speech,[16] that interferes with the free exercise of religion,[17] and that otherwise violates the most fundamental constitutional rights. Because the holding of the court below does not provide an adequate remedy for such violations, frustrates the intent of Congress in enacting Section 1983, is premised on an erroneous reading of this Court's opinions, and is likely to serve as a source of (highly misleading) guidance for state courts across the Nation, review by this Court is imperative.

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[15] See, *e.g.*, *Rosewell*, 450 U.S. at 507.

[16] See, *e.g.*, *Minneapolis Star* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers' Project* v. *Ragland, Inc.*, 481 U.S. 221 (1987); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

[17] See, *e.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1996

APPENDICES

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-66/109 September Term 1995

GENERAL MOTORS CORP.,

Plaintiff-Respondent,

v.

CITY OF LINDEN and The Assessor of Linden,

Defendants-Appellants and Cross-Respondents,

and

RICHARD CHAIKEN, Agent, Servant or Employee of the City of Linden,

Defendant-Respondent and Cross-Appellant.

Argued October 24, 1995 - Decided February 29, 1996

On certification to Superior Court, Appellate Division, whose opinion is reported at 279 *N.J. Super.* 449 (1995).

Donald P. Jacobs argued the cause for appellants and cross-respondents, City of Linden and the Assessor of Linden (*Budd Larner Gross Rosenbaum Greenberg & Sade*, attorneys; *Mr. Jacobs* and *Carl Greenberg*, on the briefs).

Michael H. Cohen argued the cause for respondent and cross-appellant (*Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski*, attorneys; *Mr. Cohen* and *Meredith Kaplan Stoma*, on the briefs).

Kenneth S. Geller, a member of the District of Columbia bar, argued the cause for respondent (*Garippa & Davenport*, attorneys; *Howard Friedlaender*, a member of the Michigan bar, of counsel; *John E. Garippa* and *Philip J. Giannuario*, on the brief).

John R. Lloyd argued the cause for *amicus curiae* Association of Municipal Assessors of New Jersey (*Rosenblum Wolf & Lloyd*, attorneys).

Julian F. Gorelli, Deputy Attorney General, argued the cause for *amicus curiae* Director, Division of Taxation (*Deborah T. Poritz*, Attorney General of New Jersey, attorney; *Joseph L. Yannotti*, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by POLLOCK, J.

The dispositive issue is whether General Motors Corporation (GM) may maintain an action under 42 *U.S.C.A.* 1983 (section 1983)[1] against defendants: City of Linden; Emanuel Frangella, Linden's tax assessor; and Richard Chaiken, a property appraiser retained by Frangella. Essentially, GM claims that defendants discriminated against it by assessing GM's automobile assembly plant in violation of GM's due process rights. Underlying that claim is GM's contention that defendants reassessed the plant at an excessive value in retaliation for GM's appeals from prior assessments.

The Law Division granted summary judgment for defendants, reasoning that it lacked jurisdiction to entertain GM's section 1983 action and that defendants enjoyed absolute immunity. The Appellate Division reversed and remanded, holding that the Law Division had jurisdiction of the claim and that defendants' immunity was not absolute. 279 *N.J.Super.* 449, 653 A.2d 568 (1995). We granted defendants' petition for certification, 142 *N.J.* 454, 663 A.2d 1361 (1995).

In the interim, the United States Supreme Court decided *National Private Truck Council* v. *Oklahoma Tax Commission*, ___

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[1] Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S. ____, 115 *S.Ct.* 2351, 132 *L.Ed.* 2d 509 (1995), which prohibits state courts from providing relief under section 1983, if state law provides an adequate remedy for relief from unconstitutional tax assessments. New Jersey's system provides such a remedy. Consistent with *National Private Truck*, we reverse the judgment of the Appellate Division and reinstate the judgment dismissing GM's complaint.

I

In 1985-86, GM, at a cost of approximately $3.5 million, renovated and added 200,000 square feet to its 2.4 million square-foot plant in Linden. Linden retained Chaiken to assist Frangella in reassessing the property for 1986. Based on Chaiken's recommendation, Frangella increased the 1986 assessment by $17.69 million. The increase resulted in a prorated assessment for the last four months of 1986 in the amount of $5,896,667. On GM's appeal, the Union County Board of Taxation affirmed the assessment. GM appealed to the Tax Court, where the matter remains pending.

On October 1, 1993, GM filed this action seeking compensatory and punitive damages under section 1983. The complaint alleged that Chaiken and Frangella ("the individual defendants") had engaged in discriminatory, arbitrary, and unconstitutional conduct in reassessing GM's property. GM sought damages of $2 million, plus interest, costs, and attorneys fees.

Because of the appeal pending in the Tax Court, the Law Division held that the entire-controversy doctrine deprived it of jurisdiction to determine GM's section 1983 claim. The Law Division also declared that the individual defendants enjoyed absolute immunity. It dismissed the complaint against Linden, reasoning that it was not subject to liability for Frangella's alleged violation of GM's due process rights.

In reversing and remanding, the Appellate Division held that the Law Division had jurisdiction of GM's section 1983 claim. The court further stated that the individual defendants were not entitled to absolute immunity. Finally, it reversed the dismissal of the complaint in favor of Linden, asserting that because Frangella was the final policy maker on tax matters, Linden could be liable for his conduct.

Four months later, the United States Supreme Court decided *National Private Truck*, supra, ___ U.S. ____, 115 *S.Ct.* 2351, 132 L.Ed. 2d 509. That decision renders moot the issues that divided the lower courts: whether the Law Division had jurisdiction of GM's section 1983 action and whether the individual defendants were entitled to immunity.

II

Two federal statutes govern this action, section 1983 and 28 *U.S.C.A.* 1341 (section 1341),[2] the Tax Injunction Act. Generally speaking, section 1983 provides a cause of action in state or federal courts to redress federal constitutional and statutory violations by state officials. By comparison, section 1341 prohibits federal courts from enjoining the collection of a state tax "where a plain, speedy and efficient remedy may be had in the courts of such State." GM's claim arises at the intersection of the two statutes.

Decisions of the United States Supreme Court, most notably *National Private Truck* and its predecessors, guide our reading of the statutes. As those decisions make clear, Congress preserved an essential attribute of federalism by directing federal courts not to interfere in the administration of state tax systems. Fair *Assessment in Real Estate Ass'n* v. *McNary*, 454 *U.S.* 100, 103, 102 *S.Ct.* 177, 179, 70 *L.Ed.* 2d 271, 275 (1981). Relying on the principle of comity, the United States Supreme Court has held that federal courts must refrain from interfering with state tax systems whether the taxpayer seeks an injunction, 28 *U.S.C.A.* § 1341; declaratory relief, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 *U.S.* 293, 299, 63 *S.Ct.* 1070, 1073, 87 *L.Ed.* 1407, 1412 (1943); or damages, *Fair Assessment*, *supra*, 454 *U.S.* at 113, 102 *S.Ct.* at 184, 70 *L.Ed.* 2d at 281-82.

In *Fair Assessment*, a taxpayers association filed a federal court action challenging the assessment of real estate in Missouri. Claiming that the assessment violated their equal protection and due

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[2] *U.S.C.A.* 1341 provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

process rights, the taxpayers sought damages. In rejecting their claim, the United States Supreme Court held

> that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate and complete, and may ultimately seek review of the state decisions in this Court.
>
> [454 *U.S.* at 116, 102 *S.Ct.* at 186, 70 *L.Ed.* 2d at 283.]

Drawing on principles underlying section 1341, the Court explained:

> "The statute 'has its root in equity practice in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully* v. *Griffin, Inc.*, 429 *U.S.* [68], 73 [97 S.Ct. 219, 222, 50 *L.Ed.* 2d 227 (1976)]. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong.Rec. 1415 (1937) (remarks of Sen. Bone)...."
>
> [*Fair Assessment*, *supra*, 454 *U.S.* at 110, 102 S.Ct. at 183, 70 *L.Ed.* 2d at 279-80 (quoting *Rosewell* v. *LaSalle Nat'l Bank*, 450 *U.S.* 503, 522, 101 *S.Ct.* 1221, 1233, 67 *L.Ed.* 2d 464 (1981) (footnote omitted)).]

The Court reasoned that the award of damages, like the issuance of an injunction, would unduly interfere with the collection of state taxes. *Fair Assessment*, *supra*, 454 *U.S.* at 111, 102 *S.Ct.* at 184, 70 *L.Ed.* 2d at 280.

Last year, the Court extended the principle of non-interference. It held that when an adequate state remedy is available, section 1983 does not provide a cause of action in state courts. *National Private Truck*, *supra*, ____ U.S. at ____, 115 *S.Ct.* at 2355, 132 *L.Ed.* 2d at 517. In *National Private Truck*, non-resident motor carriers for truckers successfully challenged an Oklahoma tax as a violation of the commerce and privileges and immunities

clauses of the United States Constitution. The truckers alleged that Oklahoma imposed the tax in retaliation for taxes imposed by twenty-five other states on trucks registered in Oklahoma. In addition to seeking a tax refund under Oklahoma law, the truckers sought declaratory and injunctive relief under section 1983.

Earlier, the Oklahoma Supreme Court had concluded that the truckers were not entitled to relief under section 1983. The United States Supreme Court had vacated the Oklahoma Supreme Court's opinion and remanded for further consideration in light of *Dennis* v. *Higgins*, 498 *U.S.* 439, 111 *S.Ct.* 865, 112 *L.Ed.* 2d 969 (1991).

In *Dennis*, the Court recognized a trucker's challenge to a Nebraska truck tax under section 1983 as violative of the commerce clause. The Court held that commerce clause violations can give rise to a cause of action under section 1983. It explained that section 1983 "'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.'" *Id.* at 445, 111 *S.Ct.* at 869, 112 *L.Ed.* 2d at 977 (quoting *Monell* v. *Department of Social Services*, 436 *U.S.* 658, 700-01, 98 *S.Ct.* 2018, 2044, 56 *L.Ed.* 2d 611, 641 (1978)). The Court stated that "the Nebraska Supreme Court erred in holding that petitioner's claim could not be brought under 42 U.S.C. § 1983." *Id.* at 451, 111 *S.Ct.* at 873, 112 *L.Ed.* 2d at 981.

Notwithstanding the holding in *Dennis*, the Oklahoma Supreme Court on remand denied relief under section 1983. Without discussing *Dennis*, the United States Supreme Court affirmed. The absence of any discussion of *Dennis* renders *National Private Truck* somewhat enigmatic. Our reading of *National Private Truck* leads us to conclude that the Court has determined that Congress did not intend claims involving state tax administration to be actionable under section 1983 in state or federal court, whether those claims arise from alleged violations of the interstate commerce or due process clauses. The United States Supreme Court has recognized an exception under section 1983 for challenges to a state tax system when a state provides a plain, adequate, and complete remedy.

As the Court explained in *National Private Truck*, "the background presumption that federal law generally will not interfere

with administration of state taxes leads us to conclude that Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases." ____ *U.S.* at ____, 115 *S.Ct.* at 2355, 132 *L.Ed.* 2d at 517.

The Court explained further:

> Just as *Fair Assessment* relied upon a background principle in interpreting § 1983 to preclude damage actions in tax cases brought in federal court, so we rely on the same principle in interpreting § 1983 to provide no basis for courts to award injunctive relief when an adequate legal remedy exists. Our interpretation is supported not only by the background principle of federal non-interference discussed in *Fair Assessment*, but also by the principles of equitable restraint discussed at length in that case. Whether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this case.
>
> [*National Private Truck, supra*, ___ U.S. at ___, 115 *S.Ct.* at 2356, 132 *L.Ed.* 2d at 518.]

Before *National Private Truck*, some state courts had interpreted *Fair Assessment* as limiting federal court jurisdiction. *See Burrell* v. *Mississippi State Tax Comm'n*, 536 *So.* 2d 848, 864 (Miss. 1988) (stating that notwithstanding jurisdictional bar on federal courts in *Fair Assessment*, state court must hear section 1983 suits); *Bung's Bar & Grille, Inc.* v. *Township Council*, 206 *N.J. Super.* 432, 459-61, 502 A.2d 1198 (1985) (noting that neither Tax Injunction Act nor *Fair Assessment* prohibits section 1983 access to state courts); *see also* Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 *Harv. L. Rev.* 1888, 1902-03 (1990) (observing that limits on federal jurisdiction in *Fair Assessment* do not extend to state courts, which must hear section 1983 state tax challenges). Some federal courts also understood *Fair Assessment* as limiting their jurisdiction and specifically acknowledged the availability of section 1983 state tax suits in state courts. *See Bernard* v. *Village of Spring Valley*, 30 *F.*3d 294, 297 (2d Cir.1994) (dismissing section 1983 tax suit in federal court because adequate remedies "such as a § 1983 suit in state court" are available); *Long Island Lighting Co.* v. *Brookhaven (LILCO)*, 889 F.2d 428, 432-33 (2d Cir.1989) (same).

Other state courts, anticipating the holding in *National Private Truck*, interpreted *Fair Assessment* to preclude section 1983 actions in any forum so long as the state provides an adequate legal remedy. *See Harlan Sprague Dawley, Inc.* v. *Indiana Dep't of State Revenue*, 583 *N.E.* 2d 214, 221 (Ind. Tax 1991) (holding that principle of equitable restraint in *Fair Assessment* would bar state courts from hearing section 1983 state tax challenges if state remedy were adequate). These state courts, without relying explicitly on principles of comity, followed the federal courts' deference to state tax administration and declined to entertain the section 1983 actions. *See, e.g., Zizka* v. *Water Pollution Control Auth.*, 195 Conn. 682, 490 *A.*2d 509, 514 (1985) (applying rationale in *Fair Assessment* to conclude that availability of adequate state remedy "forecloses the plaintiff's § 1983 claims ... in state court"); *Stufflebaum* v. *Panethiere*, 691 S.W.2d 271, 273 (Mo. 1985) (stating that "the teaching of McNary is that, given a plain, adequate and complete remedy [under state law], taxpayers may not seek relief under § 1983"); *Hanson* v. *Quill Corp.*, 500 *N.W.*2d 196, 197 (N.D. 1993) (finding that policies underlying federal bar to section 1983 state tax suits in Tax Injunction Act and *Fair Assessment* apply equally to section 1983 actions in state courts); *Hogan* v. *Musolf*, 471 *N.W.*2d 216, 222 (1991) (same), *cert. denied*, 502 *U.S.* 1030, 112 *S.Ct.* 867, 116 *L.Ed.* 2d 773 (1992).

When read in light of *National Private Truck*, we believe that *Fair Assessment* is best understood as limiting not the jurisdiction of federal courts, but the availability of section 1983 actions in any court, federal or state. As we read it, *National Private Truck* states that a violation of the United States Constitution arising out of an assessment of a state tax generally will not give rise to a section 1983 action when the state has provided an adequate legal remedy. In sum, both state and federal courts "must refrain from granting federal relief under § 1983 when there is an adequate legal remedy." ___ U.S. at ____, 115 *S.Ct.* at 2357, 132 *L.Ed.* 2d at 519.

GM seeks to distinguish *National Private Truck* on the grounds that it seeks compensatory and punitive damages, not merely a refund or declaratory relief, as the taxpayers sought in *National Private Truck*. We reject the distinction. In *Fair*

Assessment, as in the present case, the taxpayers sought damages. Nonetheless, the Court held that when a state provides an adequate remedy, a federal court may not entertain an action for damages. The Court reasoned that a damage award would first require a declaration that the state officials had violated the taxpayers' constitutional rights. 454 *U.S.* at 113, 102 *S.Ct.* at 184, 70 *L.Ed.* 2d at 281-82. A taxpayer's right to seek damages would disrupt the tax system as much as the right to seek declaratory relief. *Ibid.* In brief, the Court focused not on the nature of the relief requested, but on the possible interference of any relief in the administration of the state tax system. Thus, neither state nor federal courts may award damages or grant either injunctive or declaratory relief when a state provides an adequate remedy.

To be adequate, a state remedy need only satisfy "minimal *procedural* criteria." *Rosewell* v. *LaSalle Nat'l Bank*, 450 *U.S.* 503, 512, 101 *S.Ct.* 1221, 1228-29, 67 *L.Ed.* 2d 464, 473 (1981). Courts measure the adequacy of a state remedy by procedural, not substantive, criteria. *Id.* at 512, 101 *S.Ct.* at 1229, 67 *L.Ed.* 2d at 473. Further, courts should construe narrowly the exception to the requirements of an adequate remedy. *California* v. *Grace Brethren Church*, 457 *U.S.* 393, 413, 102 *S.Ct.* 2498, 2510, 73 *L.Ed.* 2d 93, 109 (1982).

In *Rosewell*, the taxpayer sought injunctive relief in a section 1983 suit involving a tax assessment of her property. She alleged due process and equal protection violations, claiming that disparities in assessments were based on race and that the excessive assessment of her property was in retaliation for challenging prior assessments. 450 *U.S.* at 507, 101 *S.Ct.* at 1226, 67 *L.Ed.* 2d at 470. The municipality contended that the suit was not cognizable under section 1983 because the state's refund procedure provided an adequate remedy. *Id.* at 510-11, 101 *S.Ct.* at 1228, 67 *L.Ed.* 2d at 472.

In accepting that contention, the Court concluded that the municipality could require the taxpayer to pay the tax and seek a refund afterward. *Id.* at 512, 101 *S.Ct.* at 1228-29, 67 *L.Ed.* 2d at 473; *see also McKesson* v. *Division of Alcoholic Beverages*, 496 *U.S.* 18, 39-40 & n. 21, 110 *S.Ct.* 2238, 2251-52 & n. 21, 110 *L.Ed.* 2d 17, 37-38 & n. 21 (1991) (noting that due process requires only that state provide either pre-deprivation process, *e.g.*,

a hearing, or post-deprivation process, *e.g.*, a tax refund). To be adequate, a state remedy merely needs to provide an opportunity sometime for a "full hearing and judicial determination" at which the taxpayer may raise all constitutional objections to the tax. *Rosewell, supra*, 450 *U.S.* at 515 & n. 19, 101 *S.Ct.* at 1230 & n. 19, 67 *L.Ed.* 2d at 475 & n. 19.

In other contexts, when plaintiffs have alleged substantive due process or other constitutional violations involving tax matters, courts consistently have analyzed the adequacy of the remedy in terms of the process afforded by the state. *See, e.g., Grace Brethren Church, supra*, 457 *U.S.* at 415-17, 102 *S.Ct.* at 2511-12, 73 *L.Ed.* 2d at 111-12 (observing that First Amendment claim could be adequately addressed in challenge to constitutionality of unemployment tax in state court); *Fair Assessment, supra*, 454 *U.S.* at 116, 102 *S.Ct.* at 186, 70 *L.Ed.* 2d at 283-84 (finding that allegations of retaliatory tax increase to penalize taxpayers who appealed prior assessments could be adequately remedied in state court); *Rosewell, supra*, 450 *U.S.* at 528, 101 *S.Ct.* at 1237, 67 *L.Ed.* 2d at 483 (stating that allegations that tax assessor taxed minority-owned buildings at higher rate were adequately addressed in state's refund procedure); *LILCO, supra*, 889 *F.*2d at 431 (determining that refund was adequate to remedy allegation of discriminatory tax); *Garrett* v. *Bamford*, 582 F.2d 810 (3d Cir. 1978) (stating that equal protection claim alleging disparate property assessments was properly addressed through adequate administrative and judicial review in state court); *Moore* v. *Trippe*, 743 F. Supp. 201 (S.D.N.Y. 1990) (finding refund adequate to address allegations of religious discrimination as evidenced by unfair tax assessment).

Concerning the exercise of the power to tax, "the States are afforded great flexibility in satisfying the requirements of due process." *National Private Truck, supra*, ___ U.S. at ___, 115 *S.Ct.* at 2355, 132 *L.Ed.* 2d at 516. A state remedy need not be identical to section 1983 remedies. *Sipe* v. *Amerada Hess Corp.*, 689 *F.*2d 396, 407 (3rd Cir. 1982). It need not be the best remedy available, *Colonial Pipeline Co.* v. *Collins*, 921 *F.*2d 1237, 1245 (11th Cir. 1991); *Mendel* v. *Hutchinson*, 494 *F.*2d 364, 367 (9th Cir. 1974); the most convenient remedy, *Behe* v. *Chester County Bd. of Assessment Appeals*, 952 *F.*2d 66, 68 (3rd Cir. 1991); or

equal to or comparable with federal remedies, *Colonial Pipeline Co.*, *supra*, 921 *F.*2d at 1245; *Mandel*, *supra*, 494 *F.*2d at 367. A requirement that plaintiffs exhaust administrative remedies before filing section 1983 actions does not render the state remedy inadequate. *See Grace Brethren Church*, *supra*, 457 *U.S.* at 416 n. 35, 102 *S.Ct.* at 2512 n. 35, 73 *L.Ed.* 2d at 112 n. 35. Finally, a taxpayer's failure to resort to available state procedures does not render those procedures insufficient. *Burris* v. *City of Little Rock*, 941 F.2d 717, 721 n. 4 (8th Cir. 1991).

Here, the tax is an *ad valorem* real property tax administered by municipal officials. Although commonly described as a local property tax, the tax constitutes a state tax for purposes of determining the availability of section 1983 relief. *See New Jersey State League of Municipalities* v. *Kimmelman*, 105 *N.J.* 422, 429 (1987) (stating that "[a]ll taxes are state taxes even though levied for county or municipal purposes").

New Jersey law provides several opportunities for taxpayers to raise constitutional objections to an added assessment. A taxpayer may challenge the added assessment by appealing to the County Board of Taxation on or before December 1st of the year of the assessment. *N.J.S.A.* 54:4-63.11. The County Board must hear the appeal and render judgment within one month after the last day for filing such appeals. *Ibid.* If the taxpayer is still dissatisfied, he or she may appeal the Board's decision to the Tax Court within forty-five days of the Board judgment. *Ibid.* In the Tax Court, the taxpayer is entitled to a de novo hearing before a tax court judge with expertise in the field of real property valuation. *N.J.S.A.* 2B:13-3(b); *see* Union City Associates v. City of Union City, 115 *N.J.* 17, 23 (1989) (stating that Tax Court provides *de novo* review).

Even before the recent amendment to *N.J.S.A.* 2B:13-2, which expands Tax Court jurisdiction to hear any tax-related matters over which the Superior Court would have jurisdiction, the Tax Court could correct an unconstitutional assessment. *See, e.g.*, *Township of West Milford* v. *Van Decker*, 120 *N.J.* 354, 576 A. 2d 881 (1990) (plaintiffs successfully challenged imposition of property tax on grounds tax violated their federal equal protection rights). In brief, a taxpayer may challenge the constitutionality of a state tax without proceeding under section 1983. *See Salorio* v. *Glaser*, 82

N.J. 482, 414 *A.2d* 943, *cert. denied*, 449 *U.S.* 874, 101 *S.Ct.* 215, 66 *L.Ed.* 2d 94 (1980).

A taxpayer may appeal from the Tax Court to the Appellate Division. *N.J.S.A.* 2B:3-4. If the taxpayer succeeds at any level, the taxing district must refund the excess taxes plus five-percent interest within sixty days of the final judgment. *N.J.S.A.* 54:3-27-.2; *see Rosewell, supra*, 450 *U.S.* at 528, 101 *S.Ct.* at 1237, 67 *L.Ed.* 2d at 483 (stating that refund without interest can be adequate to preclude federal court relief). Based on the Supreme Court's "minimal procedural criteria," *Rosewell, supra*, 450 *U.S.* at 512, 101 *S.Ct.* at 1229, 67 *L.Ed.* 2d at 473, we believe that the remedies under New Jersey law are adequate to preclude section 1983 suits in either federal or state courts.

In characterizing GM's allegations as procedural, we recognize that GM alleges that defendants intentionally discriminated against it in violation of GM's substantive due process rights. GM's pending appeal in the Tax Court provides an adequate remedy for any alleged violation of its federal rights. In that proceeding, GM may also seek to introduce evidence to overcome the presumptive validity of the assessment. *Pantasote Co.* v. *City of Passaic*, 100 *N.J.* 408, 417, 495 *A.2d* 1308 (1985).

We need not reach the question whether discrimination, based on race, religion, gender, or the like, could constitute a violation of a taxpayer's constitutional rights. The issue is not before us. Suffice it to state that we do not read the decisions of the United States Supreme Court as legitimizing any form of invidious discrimination. Furthermore, the Law Against Discrimination, *N.J.S.A.* 10:5-1 to 5-42, assures New Jersey citizens protection against any such discrimination.

Although not essential to our decision, we note that important policy considerations also weigh in favor of precluding relief under section 1983 in state tax cases. First, the availability of section 1983 in state tax cases would permit taxpayers to circumvent the December deadline imposed by *N.J.S.A.* 54:4-63.11. As discussed above, the time permitted to file a tax appeal is shorter than other personal injury actions. The statute of limitations for personal injury claims based on negligence, including section 1983 claims, is two years. *See Wilson* v. *Garcia*, 471 *U.S.* 261, 105 *S.Ct.* 1938,

85 *L.Ed.* 2d 254 (1985) (stating that statute of limitations for section 1983 actions is the state's statute of limitations for personal injury actions). As this Court has previously stated:

> "The policy of applying strict time limitations to tax matters is based upon the very nature of our administrative tax structure.... Throughout our tax legislation, it is clear that our legislature has attempted to set out a well organized time-table for the purpose of enabling a municipality to ascertain the amount of taxable ratables within the jurisdiction in order that it might adopt a responsible and fairly accurate budget."
>
> [*F.M.C. Stores Co.* v. *Borough of Morris Plains*, 100 *N.J.* 418, 425 (quoting *Township of Galloway* v. *Petkevis*, 2 *N.J. Tax* 85 (1980)).]

To permit a longer statute of limitations in section 1983 tax cases would thwart the express intent of the Legislature and introduce uncertainty into the administration of the state tax laws. Additionally, allowing section 1983 actions in state tax cases would circumvent the statutory scheme, which requires that a taxpayer challenging an added assessment appeal first to the County Board pursuant to *N.J.S.A.* 54:4-63.11, then to the Tax Court, and, if necessary, to the Appellate Division. *See N.J.S.A.* 54:4-63.11; *R.* 2:2-3(a)(1).

Finally, the Director of the Division of Taxation, who certifies all municipal assessors, may suspend an assessor or revoke the assessor's certification "for dishonest practices, or willful or intentional failure, neglect or refusal to comply with the constitution and laws relating to the assessment and collection of taxes or other good cause." *N.J.S.A.* 54:1-35.29. Thus, a tax assessor who violates taxpayers' constitutional rights runs the risk of removal. In sum, ample reasons support the decision not to recognize a section 1983 action challenging the conduct of an assessor.

The judgment of the Appellate Division is reversed, and the matter is remanded to the Law Division for entry of a judgment of dismissal.

CHIEF JUSTICE WILENTZ and JUSTICES HANDLER, O'HERN, GARIBALDI, STEIN, and COLEMAN join in JUSTICE POLLOCK's opinion.

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5963-92T2

GENERAL MOTORS CORP.,

Plaintiff-Appellant-
Cross-Respondent,

v.

CITY OF LINDEN, THE ASSESSOR
OF LINDEN, AND RICHARD CHAIKEN,

Defendant-Respondents-
Cross-Appellants.

Argued October 5, 1994 - Decided February 3, 1995

Before Judges Shebell, Skillman and Kleiner.

On appeal from Superior Court of New Jersey, Law Division, Union County.

Kenneth S. Geller, a member of District of Columbia Bar admitted *pro hac vice*, argued the cause for appellant-cross-respondent (Garippa & Davenport, attorneys; John E. Garippa, Philip J. Giannuario, John J. Sullivan and Mr. Geller, on the brief).

Donald P. Jacobs, argued the cause for respondents-cross-appellants City of Linden and Tax Assessor of Linden (Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, attorneys; Carl Greenberg, Vincent J. Proto and Mr. Jacobs, on the brief).

Michael H. Cohen, argued the cause for respondent-cross-appellant Richard Chaiken (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, attorneys; Heidi P. Rubin Cohen and Mr. Cohen, on the brief).

The opinion of the court was delivered by SKILLMAN, J.A.D.

Plaintiff General Motors Corporation brought this action under the Federal Civil Rights Act, 42 *U.S.C.A.* § 1983, against defendants City of Linden ("Linden"), its tax assessor, Emanuel Frangella ("Frangella"), and an independent real estate appraiser retained by Linden to assist in valuing plaintiff's property, Richard Chaiken ("Chaiken"). Plaintiff claimed that defendants violated its rights under the federal and state constitutions by imposing an arbitrary, discriminatory and excessive property tax assessment on its automobile assembly plant in Linden. By an amended complaint, plaintiff claimed that Chaiken negligently valued its property and therefore is also liable under common law tort principles.

The Law Division concluded that it lacked jurisdiction over plaintiff's § 1983 claims because they relate to a tax assessment. Despite holding that it lacked jurisdiction, the Law Division also ruled that the individual defendants have absolute immunity from suit under § 1983 for an alleged violation of constitutional rights relating to a tax assessment and that Linden cannot be held responsible for any constitutional violation which its tax assessor may have committed. In addition, the Law Division, citing *J.H. Becker, Inc.* v. *Marlboro Township*, 82 *N.J. Super.* 519, 530, 198 A.2d 463 (App. Div. 1964), dismissed plaintiff's common law negligence claim against Chaiken on the ground that his valuation of plaintiff's property was "not binding upon the tax assessor." The trial court subsequently denied defendants' motions for counsel fees and costs.

Plaintiff has appealed from the summary judgment in defendants' favor and defendants have cross-appealed from the denial of their applications for counsel fees and costs.

Initially, we note that the order from which this appeal has been taken is not a final judgment appealable as of right because it does not include a final determination of defendants' applications for counsel fees and costs. Defendants argued in support of their applications for attorney fees that even if they did not enjoy absolute immunity from suit under § 1983, plaintiff's proofs were "woefully inadequate and could not sustain a cause of action." In denying defendants' applications, the trial court stated:

> [D]efendants also base their request for attorney fees on the assertion that General Motor's lawsuit lacked any basis in fact. ...
>
> Plaintiff responds that it would be unfair for this Court to grant attorney fees ... because discovery has been stayed and therefore, the facts have not been disclosed. ...
>
> ....
>
> [P]laintiff argues that it has sufficient proofs, or will through discovery obtain sufficient proofs to show that the defendant's assessment was the result of discrimination or retaliation. ...
>
> Plaintiff argues that it should not be stalled from developing further proofs of a conspiracy and that, under the circumstances, a motion for attorney fees at this time is premature. General Motors argues that it should be given the opportunity to have discovery and to brief and argue the facts which it alleges demonstrates a conspiracy and bad faith.
>
> This Court accepts the plaintiff's argument at this time thereby denies the defendants' request for attorney fees. But I note once again that the proofs submitted to date are inadequate and insufficient as a basis for a 1983 claim.
>
> In light of my decision regarding attorney fees, the issue of costs will be held in abeyance until such time as the issue of attorney fees is resolved.

Thus, the trial court's denial of defendants' applications for counsel fees was without prejudice to their later renewal, because that denial was based in part on plaintiff's request to be allowed to conduct additional discovery.

This decision was memorialized by a "final order," entered on June 30, 1993, which stated in part that "defendants' motions to include reasonable attorneys' fees as part of their costs are hereby denied, and that the issue of defendants' court costs shall be held in abeyance." Considered in light of the court's prior oral opinion, we read this order to deny defendants' applications for attorney fees without prejudice to their renewal after General Motors completes discovery. See *Church of Scientology of Cal.* v. *Cazares*, 638 F.2d 1272, 1290 (5th Cir. 1981) (indicating that even though a § 1983 action presents "novel legal issues," it nevertheless may be

"groundless" and thus warrant an award of counsel fees to a defendant if plaintiff's claims have no substantial factual foundation). In addition, this order expressly held defendants' application for costs in abeyance.

An appeal as of right may be taken to this court only from a final judgment, which requires a final disposition of all claims as to all parties. *Hudson* v. *Hudson*, 36 *N.J.* 549, 553 (1962). Consequently, an order which holds an application for attorneys' fees or costs in abeyance or which denies the application pending the completion of further discovery is not a final judgment. *See In re Estate of Johnson*, 240 *N.J. Super.* 134, 136 (App. Div. 1990).

Although the order from which this appeal has been taken is interlocutory, the appeal has been fully briefed and argued. Moreover, we are satisfied that the interests of justice will be served by a decision of this court with respect to certain of the issues presented. Therefore, we grant plaintiff leave to appeal *nunc pro tunc*. See *R.* 2:4-4(b)(2). However, since the denial of defendants' applications for attorneys' fees and costs were without prejudice and contemplated further proceedings before the trial court, we dismiss defendants' cross appeals.

We conclude that the trial court erred in holding that it lacked jurisdiction over this matter. The court also erred in its further holding that defendants enjoy absolute immunity from a suit under § 1983 alleging a denial of federal constitutional rights in connection with a tax assessment. Since the trial court did not decide and the parties have not addressed whether plaintiff's allegations state a cause of action under § 1983, we do not pass upon this question. Finally, we agree with the trial court's holding that Chaiken may not be held liable under common law tort principles for negligence in rendering an opinion to Linden regarding the fair market value of plaintiff's property.

I

A plaintiff in a § 1983 action may recover both compensatory and punitive damages against any municipal official or employee responsible for a deprivation of federal constitutional rights, *Smith* v. *Wade*, 461 *U.S.* 30, 35-36, 103 *S.Ct.* 1625, 1629, 75 *L.Ed.* 2d 632, 638-39 (1983); *Carey* v. *Piphus*, 435 *U.S.* 247, 254-57, 98 *S.Ct.* 1042, 1047-49, 55 *L. Ed.* 2d 252, 259-60 (1978), and also

may recover compensatory, but not punitive, damages against a municipality. *Newport* v. *Facts Concerts, Inc.*, 453 *U.S.* 247, 101 *S. Ct.* 2748, 69 *L. Ed.* 2d 616 (1981). In addition, a prevailing party in an action under § 1983 may recover attorneys' fees. 42 *U.S.C.* § 1988; *see Farrar* v. *Hobby*, ___ U.S. ____, 113 *S.Ct.* 566, 121 *L. Ed.* 2d 494 (1992).

"State courts as well as federal courts have jurisdiction over § 1983 cases," *Howlett* v. *Rose*, 496 *U.S.* 356, 358, 110 *S.Ct.* 2430, 2433, 110 *L. Ed.* 2d 332, 342 (1990), and "[t]he existence of this jurisdiction creates an implication of duty to exercise it." *Id.* at 369-70, 110 *S.Ct.* at 2439-40, 110 *L. Ed.* 2d at 349 (quoting *Mondou* v. *New York, N.H. & H.R. Co.*, 223 *U.S.* 1, 58, 32 *S.Ct.* 169, 178, 56 *L.Ed.* 327, 349 (1912)). § 1983 is enforceable in state courts "not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum ... but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Id.* at 367, 110 *S.Ct.* at 2438, 110 *L. Ed.* 2d at 347. Therefore, New Jersey is required to provide a forum in which a party may seek the full range of remedies authorized by § 1983.

However, in exercising jurisdiction over § 1983 claims, "[t]he States ... have great latitude to establish the structure and jurisdiction of their own courts." *Id.* at 372, 110 *S.Ct.* at 2441, 110 *L. Ed.* 2d at 351. Relying upon this principle, the Law Division held that it lacked jurisdiction over plaintiff's § 1983 claims because they relate to a tax assessment and thus are within the Tax Court's exclusive jurisdiction.

The legislation creating the Tax Court, *L.* 1978, *c.* 33, conferred jurisdiction upon that court "to hear and determine all tax appeals of such character as [had previously been] heard and determined by the Division of Tax Appeals," *N.J.S.A.* 2A:3A-3 (repealed by *L.* 1993, *c.* 74, § 3), formerly an administrative agency in the executive branch of government, *L.* 1978, *c.* 33, § 3. The Tax Court's jurisdiction was limited under this legislation to the "[r]eview of actions ... of the county board of taxation or the Director of the Division of Taxation." *N.J.S.A.* 2A:3A-4.1(a) (repealed by *L.* 1993, *c.* 74, § 3). This legislation also provided:

> The tax court, in all causes within its jurisdiction, and subject to law, may grant legal and equitable relief so that all matters in controversy between the parties may be completely determined.
>
> [*N.J.S.A.* 2A:3A-4(a) (repealed, now *N.J.S.A.* 2B:13-3(a).]

In *Alid, Inc.* v. *Township of North Bergen*, 180 *N.J. Super.* 592, 436 A.2d 102 (App. Div. 1981), we narrowly construed *N.J.S.A.* 2A:3A-4(a) as only authorizing the Tax Court to hear "equitable defenses and counterclaims" in cases otherwise within its jurisdiction. *Id.* at 601 (quoting *Donnelly* v. *Ritzendollar*, 14 *N.J.* 96, 103 (1953)). Consequently, we held that the Tax Court had no jurisdiction over an action in lieu of prerogative writs even if it related to a tax matter. The Supreme Court dismissed an appeal from our decision as moot, but impliedly approved our interpretation of *N.J.S.A.* 2A:3A-4(a) by ordering that "when relief in lieu of prerogative writ is sought with respect to any matter then pending in the Tax Court involving a state or local tax, including enforcement of an order or judgment of the Tax Court or county board of taxation, the action shall be transferred to the Superior Court, Law Division." *Alid, Inc.* v. *Township of North Bergen*, 89 *N.J.* 388, 388-89 (1981).[1]

Given the limitations upon its jurisdiction imposed by *N.J.S.A.* 2A:3A-3 and *N.J.S.A.* 2A:3A-4.1(a), the Tax Court lacked the authority to award the full range of remedies authorized by § 1983. Although the Tax Court could correct an assessment made in violation of federal constitutional rights, *see Township of West Milford* v. *Van Decker*, 120 *N.J.* 354, (App. Div. 1990), thereby providing a taxpayer with part of the equitable relief available in a § 1983 action, its jurisdiction would not extend to awarding compensatory and punitive damages against a tax assessor or other public official who had violated a taxpayer's constitutional rights or

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[1] We note that a taxpayer may challenge the validity of a state tax under the United States Constitution in the New Jersey courts without proceeding under the Federal Civil Rights Act. *See, e.g., Salorio* v. *Glaser*, 82 *N.J.* 482, *cert. denied*, 449 *U.S.* 874, 101 *S.Ct.* 215, 66 *L. Ed.* 2d 94 (1980).

granting equitable relief broader in scope than the simple correction of an erroneous tax assessment.[2]

Defendants argue that plaintiff is precluded in any event from maintaining a § 1983 action in a state court because an appeal to the Tax Court seeking the correction of the alleged erroneous tax assessment constitutes an adequate remedy. Defendants rely upon a line of state court decisions which hold that a § 1983 action for an alleged violation of federal constitutional rights relating to a tax

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[2] Subsequent to the trial court's decision in this case, the Legislature expanded the Tax Court's jurisdiction to include the review of any action or regulation of any state, county or municipal official relating to a "tax matter," *N.J.S.A.* 2B:13-2(a), as well as "actions cognizable in the Superior Court which raise issues as to which expertise in matters involving taxation is desirable," *N.J.S.A.* 2B:13-2(b); *L.* 1993, *c.* 74, § 1. These provisions may now provide the requisite authorization for the Tax Court to entertain a § 1983 action and to award the full range of remedies available in such an action, including compensatory and punitive damages. However, the trial court did not have the opportunity to pass upon the effect of this new legislation and the parties have not even cited *N.J.S.A.* 2B:13-2 in their appellate briefs. Furthermore, this legislation does not provide for the transfer to the Tax Court of pending actions which were beyond the Tax Court's jurisdiction under the former *N.J.S.A.* 2A:3A-3 and *N.J.S.A.* 2A:3A-4.1(a) but are now subject to its jurisdiction under *N.J.S.A.* 2B:13-2. *Compare N.J.S.A.* 2A:3A-26, part of the legislation creating the Tax Court, which transferred all cases then pending in the former Division of Tax Appeals to the Tax Court. Therefore, our decision is based solely on the legislation which governed the Tax Court's jurisdiction at the time of the trial court's decision. *See Sutherland Stat. Const.* § 41.08 (5th ed. 1993) ("[C]ourts do not favor interpretations of jurisdictional statutes which give them retroactive effect.").

We note that even if *N.J.S.A.* 2B:13-2 were applicable to this action, the only consequence would be that the Tax Court judge to whom we have ordered the case assigned would hear the matter as a Tax Court rather than a Superior Court judge. We also note that the validity of defendants' argument that a § 1983 action for an alleged violation of federal constitutional rights relating to a tax assessment is not maintainable in a state court, discussed on pp. 459-63 of this opinion, does not turn on the scope of the Tax Court's jurisdiction as a matter of state law.

assessment is not maintainable in a state court if the state provides a "plain, speedy and efficient" remedy for the erroneous assessment. *See, e.g., Zizka* v. *Water Pollution Control Auth.*, 490 *A.* 2d 509, 513-14 (Conn. 1985); *Vann* v. *DeKalb County Bd. of Tax Assessors*, 367 *S.E.*2d 43 (Ga. App. 1988); *Stufflebaum* v. *Panethiere*, 691 *S.W.*2d 271 (Mo. 1985); *State* v. *Quill Corp.*, 500 *N.W.*2d 196 (N.D.), *cert. denied*, ____ U.S. ____, 114 *S.Ct.* 173, 126 *L. Ed.* 2d 132 (1993); *Linderkamp* v. *Bismarck Sch. Dist. No. 1*, 397 *N.W.* 2d 76 (N.D. 1986); *L.L. Bean* v. *Bracey*, 817 *S.W.* 2d 292, 294-97 (Tenn. 1991). These cases are based upon the Federal Anti-Injunction Act, 28 *U.S.C.A.* § 1341, which provides that "[t]he [federal] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," and the Supreme Court's holding in *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 *U.S.* 100, 116, 102 *S.Ct.* 177, 186, 70 *L. Ed.* 2d 271, 283 (1981) that even when § 1341 does not directly apply, "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." These cases reason that although § 1341 and *McNary* only impose limitations upon the power of federal district courts, "a § 1983 challenge which could not be brought in federal court should not be allowed in a state court," in order to maintain uniform results in federal and state courts. *Linderkamp* v. *Bismarck Sch. Dist. No. 1*, *supra*, 397 *N.W.*2d at 78-79.

We reject this reasoning and hold that neither the Tax Injunction Act nor the comity rationale of *McNary* apply to a § 1983 action in state court. The Tax Injunction Act only limits the authority of a federal district court to grant injunctive relief regarding the "assessment, levy or collection" of a tax imposed under state law. It does not in any way limit the power of a state court. Likewise, nothing in *McNary* suggests that a taxpayer is precluded from maintaining a § 1983 action in state court based on a state tax official's alleged violation of federal constitutional rights. To the contrary, the maintainability of a § 1983 action in state court was an essential premise of the Court's holding in *McNary* that a federal district court should not hear a taxpayer's § 1983 claims: "Such taxpayers must seek protection of their federal rights

by state remedies, provided of course that those remedies are plain, adequate and complete, and may ultimately seek review of the state decisions in this Court." *Fair Assessment in Real Estate* v. *McNary*, *supra*, 454 *U.S.* at 116, 102 *S.Ct.* at 186, 70 *L. Ed.* 2d at 283. In fact, the Court noted that "the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may seek a § 1983 claim in state court." *Id.* at 116, 102 *S.Ct.* at 186, 70 *L. Ed.* 2d at 284, *see also Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 *U.S.* 89, 122, 104 *S.Ct.* 900, 919, 79 *L. Ed.* 2d 67, 92 (1984) ("Challenges to the validity of state tax systems under 42 *U.S.C.* § 1983 ... must be brought in state court.").

Moreover, if we were to hold that a § 1983 action is not maintainable in a state court solely because an alleged deprivation of constitutional rights relates to a tax assessment, it would mean that a tax assessor could engage in a practice of racially discriminatory tax assessments without being subject to personal liability under § 1983. Since the prevention of racial discrimination by state officials was the essential reason for the enactment of § 1983, see *Mitchum* v. *Foster*, 407 *U.S.* 225, 238-242, 92 *S.Ct.* 2151, 2160-62, 32 *L. Ed.* 2d 705, 715-17 (1972), we are unwilling to read a limitation into the scope of its operation which would prevent a state court from granting complete relief, including compensatory and punitive damages, for such a violation of constitutional rights.

Our conclusion that a state must provide a forum for a § 1983 action alleging a denial of federal constitutional rights relating to a tax assessment is supported by the decisions of other state courts, *see*, *e.g.*, *Beverly Bank* v. *Board of Review*, 453 *N.E.*2d 96 (Ill. App. 1983), *cert. denied*, 466 *U.S.* 951, 104 *S.Ct.* 2153, 80 *L. Ed.* 2d 539 (1984); *Murtagh* v. *County of Berks*, 634 *A.*2d 179 (1993), *cert. denied*, ____ U.S. ____, 114 *U.S.* 1397, 128 *L. Ed.* 2d 71 (1994), and by scholarly commentaries, Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 18.3 at 18-13 to 18-27 (Dec. 1994); Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 *Harv. L. Rev.* 1888, 1895-1908 (1990). In *Murtagh* v. *County of Berks*, *supra*, the court stated:

> The Tax Injunction Act applies by its very terms to preclude federal courts, not state courts, from enjoining state tax

> schemes. Therefore, there is no danger of federal court interference or misunderstanding. Likewise, abstention based on comity has no application when a section 1983 cause of action is brought in state courts because there is no risk of federal court interference.
>
> [634 *A.*2d at 181-82.]

Professor Steinglass notes:

> [R]eliance on the Tax Injunction Act or comity to prohibit use of § 1983 to challenge state tax policies in state courts takes doctrines designed to *encourage* state courts to protect federal rights and turns them around to limit the power of state courts.
>
> [*Steinglass*, *supra*, § 18.3(a) at 18-17.]

We recognize that the maintenance of a § 1983 action in a state court, as in a federal district court, may have "chilling effect" upon a tax assessor's performance of his official duties and may be "disruptive of [a state] tax system." *Fair Assessment in Real Estate Ass'n* v. *McNary*, *supra*, 454 *U.S.* at 113, 115, 102 *S.Ct.* at 184, 185, 70 *L. Ed.* 2d at 281, 283. However, these dangers are not a sufficient basis for denying the remedies afforded by § 1983 to a party whose constitutional rights have been violated. Instead, the possibility of vexatious use of this kind of litigation can be substantially ameliorated by effective case management and the award of counsel fees to defendants in appropriate cases. To facilitate effective case management and avoid possible conflicting decisions, a § 1983 action in the Law Division relating to a tax assessment ordinarily should be assigned to the same Tax Court judge hearing a related tax assessment appeal. Such an assignment can be made pursuant to the Chief Justice's annual order assigning all Tax Court judges to the Superior Court. *See*, *e.g.*, 137 N.J.L.J. at 1570 (Aug. 8, 1994).[3] In addition, the trial judge may stay proceedings in the § 1983 action until a related tax assessment

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[3] If the Tax Court now has jurisdiction under *N.J.S.A.* 2B:13-2 to entertain a § 1983 action relating to a tax assessment, see *n.* 2 *supra*, such an assignment may be made without reliance upon the Chief Justice's order.

appeal has been completed. *Cf. Dean* v. *State*, 826 *P.*2d 1372, *cert. denied*, ___ U.S. ___, 112 *S.Ct.* 2941, 119 *L. Ed.* 2d 566 (1992); *Nutbrown* v. *Munn*, 811 *P.*2d 131 (Or. 1991), *cert. denied*, 502 *U.S.* 1030, 112 *S.Ct.* 867, 116 *L. Ed.* 2d 773 (1992); *Hogan* v. *Musolf*, 471 *N.W.*2d 216 (Wisc. 1991), *cert. denied*, 502 *U.S.* 1030, 112 *S.Ct.* 867, 116 *L. Ed.* 2d 773 (1992); *see generally*, *Steinglass*, *supra*, at § 18.3(d).

II

As previously noted, the Law Division, after ruling that it lacked jurisdiction over plaintiff's § 1983 claims, nevertheless proceeded to consider defendants' immunity claims. Since we conclude that the Law Division has jurisdiction, we also address the court's further holding that defendants enjoy absolute immunity from suit under § 1983.

"The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns* v. *Reed*, 500 *U.S.* 478, 487, 111 *S.Ct.* 1934, 1939, 114 *L. Ed.* 2d 547, 558 (1991). Consequently, an official seeking absolute immunity from suit under § 1983 "bears the burden of showing that such immunity is justified for the function in question." *Ibid.* "Not surprisingly," the Supreme Court has been "'quite sparing' in recognizing absolute immunity for state actors in this context." *Buckley* v. *Fitzsimmons*, ___ U.S. ____, ____, 113 *S.Ct.* 2606, 2613, 125 *L. Ed.* 2d 209, 223 (1993) (quoting *Forrester* v. *White*, 484 *U.S.* 219, 224, 108 *S.Ct.* 538, 542, 98 *L. Ed.* 2d 555 (1988).

The threshold question in determining whether an official is entitled to absolute immunity under § 1983 is whether that immunity was recognized "at common law when the Civil Rights Act was enacted in 1871." *Tower* v. *Glover*, 467 *U.S.* 914, 920, 104 *S.Ct.* 2820, 2825, 81 *L. Ed.* 2d 758, 765 (1984). The prevailing view in the nineteenth century was that tax assessors enjoyed only qualified rather than absolute immunity from suit. *See*, *e.g.*, *Bailey* v. *Berkey*, 81 *F.* 737, 738 (N.D.Cal.1897) ("[T]he greater and better weight of authority supports the doctrine that while assessors are not liable to private suits for mere errors or mistakes of judgment ..., they will be held liable in damages for making an excessive assessment with a malicious, corrupt, or other

sinister motive."); *Ballerino* v. *Mason*, 23 *P.* 530, 530 (1890) (county assessor not liable for property assessment in absence of allegation that "he acted maliciously, or with intent to wrong or injure the owner"); *Rowe* v. *Friend*, 38 *A.* 95, 96 (1897) (statute accords tax assessors immunity except for want of "personal faithfulness or integrity"); *E. & T. Fairbanks & Co.* v. *Kittredge*, 24 *Vt.* 9, 12 (1850) ("listers" that act as property appraisers and assessors incur no personal liability unless "actuated by malice"). Therefore, defendants have not established the firmly recognized immunity at common law required to support a claim of absolute immunity from suit under the Federal Civil Rights Act.

The trial court nevertheless concluded that a tax assessor is entitled to absolute immunity under § 1983 because he acts as "an arm of the legislature," thus qualifying for the absolute immunity of a legislator, see *Tenney* v. *Brandhove*, 341 *U.S.* 367, 71 *S.Ct.* 783, 95 *L.Ed.* 1019 (1951), and uses "his own independent judgment," thereby qualifying for the absolute immunity of a judge and other officials who act in a quasi-judicial capacity; see *Pierson* v. *Ray*, 386 *U.S.* 547, 87 *S.Ct.* 1213, 18 *L. Ed.* 2d 288 (1967). However, a tax assessor's responsibilities are neither legislative nor judicial in nature and hence neither of these immunities applies.

Legislative immunity only extends to official acts which are both "'procedurally' legislative, that is, passed by means of established legislative procedures," and "'substantively' legislative," that is, acts "which involve policy-making decision[s] of a general scope." *Ryan* v. *Burlington County*, 889 *F.*2d 1286, 1290-91 (3rd Cir.1989); *accord Acierno* v. *Cloutier*, 40 *F.*3d 597, 610-12 (3d Cir.1994). The assessment of plaintiff's property did not satisfy either of these tests because it did not involve public debate or a majority vote by a multi-member body, and it applied solely to plaintiff. Although a tax assessor performs official duties pursuant to legislative standards, the same is true of other executive officials who perform administrative functions beyond the protective umbrella of absolute legislative immunity. *See, e.g.*, *Cleavinger* v. *Saxner*, 474 *U.S.* 193, 106 *S.Ct.* 496, 88 *L. Ed.* 2d 507 (1985) (prison disciplinary committee members); *Wood* v. *Strickland*, 420 *U.S.* 308, 95 *S.Ct.* 992, 43 *L. Ed.* 2d 214 (1975) (school board members); *Scheuer* v. *Rhodes*, 416 *U.S.* 232, 94

S.Ct. 1683, 40 *L. Ed.* 2d 90 (1974) (state executive officials, including governor and university president).

Judicial immunity only extends to the process of "resolving disputes between parties who have invoked the jurisdiction of a court," *Forrester* v. *White*, *supra*, 484 *U.S.* at 227, 108 *S. Ct.* at 544, 98 *L. Ed.* 2d at 565 (1988), or a quasi-judicial tribunal performing an analogous function. *Butz* v. *Economou*, 438 *U.S.* 478, 511-14, 98 *S.Ct.* 2894, 2913-15, 57 *L. Ed.* 2d 895, 919-21 (1978). A tax assessment does not involve any of the usual hallmarks of an adjudicatory proceeding; there is no presentation of evidence by affected parties, examination or cross-examination of witnesses, or findings of fact and conclusions of law. Instead, a tax assessor acts unilaterally based on his own examination of properties and public records in much the same fashion as executive officials who review applications for licenses and permits.

Our conclusion that tax assessors are not entitled to absolute immunity from suit under § 1983 is also supported by the decisions of other courts. In *Fulton Mkt. Cold Storage Co.* v. *Cullerton*, 582 *F.*2d 1071, 1080 (7th Cir. 1978), *cert. denied*, 439 *U.S.* 1121, 99 *S.Ct.* 1033, 59 *L. Ed.* 2d 82 (1979), the court held that a tax official would be liable for damages under § 1983 "if he violated the plaintiff's clearly established constitutional rights intentionally or with reckless disregard of those rights." The court also stated that "[q]uite clearly, if a county or state tax official intentionally and unjustifiably raised an individual's property tax assessment merely because of the individual's race, ethnic background or political affiliation, the official could be liable for damages under § 1983 for the misuse of his authority." *Id.* at 1079. Similarly, in *Werch* v. *City of Berlin*, 673 *F.*2d 192, 195 (7th Cir. 1982), the court indicated that municipal officials exercising taxing authority were entitled to "qualified immunity." *See also Ludwin* v. *City of Cambridge*, 592 *F.*2d 606, 610 n.1 (1st Cir. 1979).

Since the absolute immunity of defendant Chaiken, the consultant retained by Linden to assist in the assessment of plaintiff's property, was derivative of the tax assessor's claimed absolute immunity, *see Dennis* v. *Sparks*, 449 *U.S.* 24, 101 *S. Ct.* 183, 66 *L. Ed.* 2d 185 (1980), which we have now rejected, we also conclude that the trial court erred in dismissing plaintiff's § 1983 claim against Chaiken on the basis of absolute immunity.

The tax assessor argues in the alternative that even if he does not have absolute immunity from suit under § 1983 for any action relating to an assessment, the summary judgment in his favor should be affirmed on the ground of qualified immunity. However, the trial court did not pass upon this argument. Although the court stated in a single conclusionary sentence in its written decision of February 22, 1993, that "even if this suit were maintainable because Frangella and Chaiken had only qualified immunity, this court is of the opinion that the plaintiff's proofs are nevertheless woefully inadequate and could not sustain a cause of action," the court subsequently characterized this statement as "dicta, unnecessary to its holdings which rested on legal insufficiency," that is, the court's lack of jurisdiction, and defendants' absolute immunity, rather than "factual insufficiency." Therefore, although the individual defendants may be entitled to prevail on the basis of qualified immunity, we do not believe that this court should decide the availability of this defense summarily without the trial court first reviewing the relevant evidence. The trial court's consideration of this defense should be governed by the principles set forth in *Harlow* v. *Fitzgerald*, 457 *U.S.* 800, 815-19, 102 *S.Ct.* 2727, 2736-38, 73 *L. Ed.* 2d 396, 408-11 (1982), *Mitchell* v. *Forsyth*, 472 *U.S.* 511, 526, 105 *S.Ct.* 2806, 2816, 86 *L. Ed.* 2d 411, 425 (1985), *Malley* v. *Briggs*, 475 *U.S.* 335, 344-45, 106 *S. Ct.* 1092, 1098, 89 *L. Ed.* 2d 271, 280-81 (1986) and *Anderson* v. *Creighton*, 483 *U.S.* 635, 639-40, 107 *S.Ct.* 3034, 3038-39, 97 *L. Ed.* 2d 523, 530-31 (1987); *see also Kirk* v. *City of Newark*, 109 *N.J.* 173 (1988).

III

We turn next to plaintiff's § 1983 claim against Linden. Although a municipality may not be held vicariously liable under the doctrine of *respondeat superior* for a claim under § 1983, it may be liable for a violation of constitutional rights committed by one of its officers or employees pursuant to official policy. *Monell* v. *New York City Dept. of Social Servs.*, 436 *U.S.* 658, 98 *S.Ct.* 2018, 56 *L. Ed.* 2d 611 (1978). The Supreme Court in a plurality opinion identified "several guiding principles" to determine whether a deprivation of constitutional rights by a municipal official or employee was committed pursuant to municipal policy:

> First, ... municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. Third, whether a particular official has "final policymaking authority" is a question of *state law*. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business.
>
> [*St. Louis* v. *Praprotnik*, 485 *U.S.* 112, 123, 108 *S.Ct.* 915, 924, 99 *L. Ed.* 2d 107, 118 (1988) (quoting *Pembaur* v. *Cincinnati*, 475 *U.S.* 469, 480, 483, 106 *S.Ct.* 1292, 1298, 1300, 89 *L. Ed.* 2d 452, 463, 465 (1986) (Brennan, J., plurality opinion).]

The Court also indicated that "an unconstitutional governmental policy [may] be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Id.* at 123, 108 *S.Ct.* at 924, 99 *L. Ed.* 2d at 117; *accord Pembaur* v. *Cincinnati*, *supra*, 475 *U.S.* at 480, 106 *S.Ct.* at 1298, 89 *L. Ed.* 2d at 464.

A tax assessor's deprivation of constitutional rights in assessing property may be found to constitute the official policy of the municipality which appointed the assessor. *N.J.S.A.* 54:4-23 confers plenary authority upon a tax assessor to "determine the full and fair value of each parcel of real property situate in the taxing district" and to "compute and determine the taxable value of such real property at the level established for the county pursuant to law." After the assessor makes an assessment, the municipality collects taxes based on that assessment and defends the assessment on any appeal to the county board of taxation or Tax Court. Thus, for purposes of property tax assessments, the acts of the tax assessor are the acts of the municipality. Consequently, a tax assessor has "final policymaking authority" with respect to municipal tax assessments and his violation of federal constitutional rights in making a tax assessment would constitute "a policy adopted by the official ... responsible under state law for making policy in that area of the city's business." *St. Louis* v. *Praprotnik*,

supra, 485 *U.S.* at 123, 108 *S.Ct.* at 924, 99 *L. Ed.* 2d at 118. Moreover, plaintiff has alleged that the Mayor of Linden, the municipality's chief executive official, participated in the violation of its constitutional rights. Therefore, the trial court erred in dismissing plaintiff's complaint against Linden.

IV

We turn finally to plaintiff's common law negligence claim against Chaiken, the professional real estate appraiser retained by Linden to assist its tax assessor in valuing plaintiff's property. The Tort Claims Act confers broad immunity upon public entities and public employees from liability for their actions relating to the assessment and collection of taxes:

> Neither a public entity nor a public employee is liable for an injury caused by:
>
> a. Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.
>
> b. An act or omission in the interpretation or application of any law relating to a tax.
>
> [*N.J.S.A.* 59:7-2.]

Therefore, plaintiff could not maintain a tort action against either the tax assessor or Linden for negligence in the assessment of its property. Instead, plaintiff's only remedy to correct an error in its assessment would be an appeal to the Union County Board of Taxation or the Tax Court. *N.J.S.A.* 54:3- 21.

Although the Tort Claims Act does not directly apply to Chaiken because he is not a public employee, *N.J.S.A.* 59:1-3, the same policy considerations which underlie the immunity provided by *N.J.S.A.* 59:7-2 also preclude a taxpayer from maintaining a negligence action against an outside consultant retained by a taxing authority to assist in a property appraisal. Our courts have recognized that the negligent performance of contractual services may provide a basis for tort liability to a third party. *See, e.g.*, *Rosenblum* v. *Adler*, 93 *N.J.* 324 (1983). However, before a court recognizes such a cause of action, it must weigh "the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." *Id.* at 341 (quoting *Goldberg* v. *Housing Auth.*

of Newark, 38 *N.J.* 578, 583 (1962)). When contractual services are performed for a governmental entity which is itself immune from tort liability for that activity, the courts should proceed with particular caution in recognizing a cause of action against a private contractor which may undermine the governmental immunity. *Cf. Vanchieri* v. *New Jersey Sports & Exposition Auth.*, 104 *N.J.* 80, 85 (1986) ("[I]ndependent contractors do, under well-recognized principles, share to a limited extent the immunity of public entities with whom they contract."); *see also Ornes* v. *Daniels*, 278 *N.J. Super.* ____, ____ (App. Div. 1994) (slip op. at 5-7).

A taxpayer has a readily available and adequate means of correcting an erroneous tax assessment by appealing to the county board of taxation and the Tax Court. *N.J.S.A.* 54:3-21; *see Union City Assoc.* v. *City of Union*, 115 *N.J.* 17 (1989). Indeed, that is a taxpayer's only remedy when an assessor makes an assessment without the assistance of an outside appraiser. Consequently, a taxpayer has no substantial need to maintain a tort action against a private appraiser. On the other hand, the consultants who perform these kinds of services and the public entities which retain them have a substantial interest in maintaining immunity from suit outside the framework of normal tax appeals. A municipality's tax assessments involve numerous properties and very substantial amounts of money. Consequently, if outside consultants who assist in the performance of this duty were subject to suit for negligence, their exposure would be substantial. This undoubtedly would cause such experts to increase the fees they charge to municipalities, thereby increasing the cost of municipal tax assessments and also discouraging municipalities from using outside experts in circumstances where their services may be needed. Therefore, the trial court correctly held that a taxpayer may not maintain a tort action against an appraiser who is negligent in advising a tax assessor as to the value of a taxpayer's property.

Accordingly, we affirm the dismissal of plaintiff's common law negligence claim against Chaiken, but reverse the dismissal of plaintiff's § 1983 claims. Defendants' cross appeals are dismissed. We remand to the Law Division for further proceedings in conformity with this opinion and direct that the case be assigned to the Tax Court judge who is hearing plaintiff's tax assessment appeals.

APPENDIX C

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY
CIVIL ACTION

DOCKET NO. UNN-L-012188-87

GENERAL MOTORS CORP.,

Plaintiff(s),

- vs - OPINION

CITY OF LINDEN, RICHARD CHAIKEN, et al.,

Defendant(s).

DECIDED: FEBRUARY 22, 1993

JOHN E. GARIPPA, ESQ., for the plaintiff, (Garippa & Trevenen, P.C., attorneys; JOHN E. GARIPPA, PHILIP J. GIANNUARIO, CHARLES E. BROWN and HOWARD FRIEDLAENDER, on the brief).

CARL GREENBERG, ESQ., for defendants, the City of Linden and Emanuel F. Frangella, (Budd, Larner, Gross, Rosenbaum, Green & Sade, P.C., attorneys; CARL GREENBERG, DONALD P. JACOBS, ALAN S. PRALGEVER and ROBERT E. BRENNER, on the brief).

MICHAEL H. COHEN, ESQ., for the defendant, Richard M. Chaiken, (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, attorneys; MICHAEL H. COHEN on the brief, JOSEPH DE DONATO of counsel).

MENZA, J.S.C.

The defendants move for summary judgment.

There are two important and novel questions involved in this case. The fast is whether a claim alleging a violation of the Civil Rights Act, 42 *U.S.C.A.* § 1983, based on a discriminatory tax

assessment, may be brought in the Superior Court. The second question is whether a tax assessor is immune from liability for an improper tax assessment.

The plaintiff, General Motors Corporation, owns and operates an automobile assembly plant in the City of Linden. In the years § 1983 to 1988, the City of Linden made various adjustments to the tax assessment on the property which it contends reflected additions and improvements made by General Motors to its plant facility. The assessments were imposed by the defendant, Emanuel F. Frangella, the tax assessor for the City of Linden, based upon the recommendations of the defendant, Richard Chaiken, an independent appraiser hired by the City to assist in the making of tax assessments. General Motors has appealed these assessments to the State Tax Court and the matters are now pending in that court.

General Motors also brought this § 1983 action in the Superior Court, contending that Frangella, Chaiken and the City of Linden have violated its constitutional rights by imposing a series of discriminatory tax assessments on its property.

Specifically General Motors contends that the following facts constitute a violation of its constitutional rights and a basis for a § 1983 claim.

First, General Motors contends that in 1985 its predecessor in title, Gordon's Gin, negotiated a settlement with the City of Linden subsequent to the sale of its facility to General Motors, which resulted in a reduction of Gordon's 1984 tax assessment on the property, reflecting the sales price. General Motors alleges that, as the new owner, it was entitled to the benefit of the new assessment, but that the City refused to reduce its assessment to the amount to which the City had agreed with Gordon's Gin.

Second, General Motors contends that the city of Linden refused to give it an exemption to which it was entitled for a waste water facility located on its property for the years 1986 through 1988.

General Motors further alleges that it was treated in a discriminatory manner with respect to an added assessment imposed in 1986 after its facility was gutted and remodeled. According to General Motors, the new assessment was based on certain improvements which had already been considered in the prior assessment

in 1985. Furthermore, General Motors alleges that the method utilized by Chaiken in calculating the assessment was arbitrary, and violated professional standards and ethical rules established for tax assessors.

General Motors also contends that no other property in the City was reevaluated when its facility received a new assessment and that this clearly demonstrates that it was improperly singled out by the City.

Finally, General Motors alleges that the City's Mayor, at a 1989 meeting with General Motors representatives, stated that "[t]he additional increased assessment was placed on the General Motors' plant because you filed the tax appeal." This statement, General Motors contends, is proof of a conspiracy by municipal officials to treat General Motors in a discriminatory manner, thereby violating its constitutional rights and giving rise to a claim under the Civil Rights Act.

The defendants, Frangella, Chaiken, and the City of Linden, now move for summary judgment contending that General Motors is prohibited from bringing a § 1983 action in the Superior Court and that in the alternative, the defendants, Frangella, the tax assessor, Chaiken, the independent appraiser, and the City, are immune from suit.

I

THE SECTION 1983 CLAIM

There are no New Jersey cases which have addressed the question of whether a taxpayer aggrieved by a property tax assessment may bring a § 1983 civil rights claim in the Superior Court.

There is, however, one Law Division case which permitted a § 1983 claim for an improper sewer tax assessment to be brought in the Superior Court.

In *Bung's Bar & Grille, Inc.* v. *Florence Tp.*, 206 *N.J. Super.* 432 (Law Div. 1985), the plaintiffs, who had successfully challenged a local sewer improvement assessment in the Superior Court, moved for summary judgment on their claim for counsel fees and costs under the Civil Rights Act. The court held that the

plaintiffs, § 1983 claims were cognizable in the Superior Court and granted the requested relief.

General Motors relies on this case as authority for the proposition that it may bring a § 1983 action in the Superior Court for a discriminatory property tax assessment while the appeal of that assessment is pending in the Tax Court. Its reliance is misplaced. In *Bung's*, the plaintiffs' challenge to the sewer improvement assessment was made in the Superior Court because the Superior Court was the only court in which such a challenge could be made. See *N.J.S.A.* 40:56-54. Since the Tax Court had no jurisdiction to hear the matter in the first place, there was no other forum but the Superior Court which could afford the taxpayers in *Bung's* a "plain, speedy and efficient remedy" on their claim of an improper sewer improvement assessment. The *Bung's* decision is therefore inapplicable to the issue of whether General Motors' § 1983 claim is cognizable in the Superior Court.

Since there are no New Jersey cases which address the issue now before the court, the court has made reference to the Federal Tax Injunction Act to assist it in its analysis.

The Tax Injunction Act prohibits a federal court from hearing a § 1983 case involving a tax matter where there exists a speedy and efficient remedy in the state courts:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.
>
> [28 *U.S.C.A.* § 1341.]

In the case of *Fair Assessment in Real Estate* v. *McNary*, 454 *U.S.* 100, 102 S.Ct. 177, 70 *L.Ed.* 2d 271 (1981), the Supreme Court explained the applicability of the Tax Injunction Act to § 1983 claims brought in the federal courts. In *Fair Assessment*, taxpayers brought suit in federal district court under 42 *U.S.C.A.* § 1983, alleging that various government entities had deprived them of due process of law by the unequal taxation of their property and sought damages in the amount of the overassessment, as well as punitive damages and expenses. The Supreme Court found that the Act applied to claims for compensatory and punitive damages as well as to claims for injunctive relief, and held that the plaintiffs

were barred from bringing a § 1983 action in federal court, because they had a plain, adequate and complete remedy in the courts of the State of Missouri.

The Supreme Court, quoting from the opinion of the district court, stated:

> To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well as prayers for punitive. damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this court being a source of appellate review of all state property tax classifications.
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> [*Id.* at 114, 102 *S.Ct.* at 185, 70 *L.Ed.* 2d at 282 (citations omitted).]

The Court noted that the doctrine which originated in the case of *Monroe* v. *Pape*, 365 *U.S.* 1671 81 *S.Ct.* 473, 5 *L.Ed.* 2d 492 (1961), states that a plaintiff challenging the constitutionality of state action is not barred by the principles of comity from bringing a § 1983 claim in the federal court. The Court went on to say, however, that:

> ... despite the ready access to federal courts provided by *Monroe* and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.
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> [*Id.* at 116, 102 *S.Ct.* at 186, 70 *L.Ed.* 2d at 283 (footnote omitted).]

Although the Tax Injunction Act limits only the jurisdiction of the federal courts, the few state courts which have addressed this issue have applied the Act's comity rationale to prohibit § 1983 actions in state court where a plain and adequate remedy exists for an aggrieved taxpayer in the tax appeal process.

In *Vann* v. *DeKalb Cty. Bd. of Tax Assessors*, 367 *S.E.*2d 43 (Ga. App. 1988), the plaintiff brought a § 1983 action in the Georgia Superior Court while his property tax appeal was in progress, alleging that the tax assessor's method of property tax appraisal violated his rights under the Georgia Constitution. The court dismissed the § 1983 action holding that those constitutional issues could be addressed in the statutory tax appeal process which provided the plaintiff with a plain and adequate remedy for his civil rights claims. The court stated:

> This case clearly involves the conduct of county tax agents occurring in direct implementation of an established county ad valorem tax procedure. However, the Supreme Court consistently has recognized that cases involving the constitutional challenge to the collection of state taxes are of a special class. Certainly, such cases usually necessitate "quick action by the State" and its taxing entities and agents to avoid substantial jeopardy to the state's overall financial structure. In *Backus* v. *Chilivis*, 236 *Ga.* 500, 224 *S.E.*2d 370, the Georgia Supreme Court recognized these considerations and stated "[t]he overriding interests of the state in an efficient, expeditious and nondisruptive resolution of ad valorem tax disputes would be seriously impaired, if not destroyed, by the allowance of [42 *U.S.C.A.* § 1983] suits." The court then concluded that a § 1983 claim is not available under Georgia law where the defendants are county taxing authorities and the basis of the claim is unequal or nonuniform imposition of ad valorem taxation.
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> [*Id.* at 47 (citations omitted).]

The court concluded that since the "linchpin" to the taxpayer's § 1983 claim was the alleged nonuniform and unequal appraisal procedure, the § 1983 claim was not cognizable. *Ibid.*

In *Zizka* v. *Water Pollution Control Authority*, 490 *A.*2d 509 (Conn. 1985), property owners brought a § 1983 claim in the Connecticut Superior Court alleging that the defendant's sewer assessment violated their constitutional rights. The Connecticut Supreme-Court held that the existence of an adequate state remedy in the nature of administrative proceedings barred the plaintiffs' claim for declaratory and monetary relief under 1983.

In reaching its decision, the court turned to the federal Tax Injunction Act for guidance. The court stated:

> Although § 1341 does not operate as a jurisdictional barrier in state courts, it nonetheless points the way to the proper standard by which state tax challenges should be measured. In a § 1983 suit seeking relief from the collection of state taxes, we may impose limitations that, like those of § 1341, inquire into whether the claimants have afforded a statutory remedy that is "plain, speedy and efficient."
>
> [*Id.* at 513-514.]

The *Zizka* court took note of the fact that the federal court had already determined that the Connecticut procedure for tax appeals provided by *C.G.S.A.* § 7-250 provided a plain, speedy and efficient remedy which barred a § 1983 claim in federal court under the Tax Injunction Act. The *Zizka* court likewise concluded that the existence of that remedy foreclosed the plaintiff's § 1983 claims in an action brought in state court:

> Since the General Assembly has fashioned an
>
> exclusive adequate remedial system for challenging excessive sewer assessments, we see no need to subject state tax collectors to state actions brought under § 1983.
>
> [*Ibid.*]

The rationale of the aforementioned cases suggests that General Motors should be precluded from bringing this action in the Superior Court if the State of New Jersey provides a remedy which is adequate, speedy and efficient.

Does the New Jersey Tax Court afford an aggrieved taxpayer a "plain, speedy and efficient" remedy for an improper property tax assessment so as to bar the bringing of a § 1983 claim in the Superior Court?

General Motors has appealed its tax assessments for the Gordon's Gin facility, and for the 1986 added assessment. Those matters are now pending before the Tax Court.[1] The relief the

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[1] General motors also plans to appeal the City's denial of the tax exemption for the waste water facility.

plaintiff seeks in the Tax Court is a reassessment of its property and a lowering of its tax obligations. In this § 1983 suit, it also seeks a lowering of its assessment and a return of monies it claims are due to it for overassessment. In addition, it seeks punitive damages and costs under the authority of the Civil Rights Act — relief it claims cannot be granted to it by the Tax Court.[2] Thus, General Motors argues that the Tax Court cannot provide an adequate remedy for the improper assessment.

The Tax Court was established by statute, *N.J.S.A.* 2A:3A-1 *et. seq.*, on July 1, 1979, pursuant to the New Jersey Constitution which authorizes the establishment of courts of limited jurisdiction. *N.J. Const.* art. VI, § 1, par. 1.

The statute provides in pertinent part:

> The tax court shall be a court of record, having a seal and shall have jurisdiction to hear and determine all tax appeals of such character as now are taken to and heard and determined by the Division of Tax Appeals in the Department of the Treasury. Practice and procedure in the tax court shall be as provided by rules of the Supreme Court.
>
> [*N.J.S.A.* 2A:3A-3.]

The statute further provides that:

> a. The tax court, in all causes within its jurisdiction, and subject to law, may grant legal and equitable relief so that all matters in controversy may be completely determined.
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> b. The tax court shall hear and determine all issue of fact and of law de novo.
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> [*N.J.S.A.* 2A:3A-4].

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[2] It is to be noted that the burden of proof in the Tax Court is different than that in the Superior Court. In the Tax Court, the plaintiff has the burden to overcome the presumption of validity of the tax assessment, whereas in the Superior Court the plaintiff has the burden of proving its case by a preponderance of the evidence. *Schmertz* v. *Dover Tp.*, 4 *N.J. Tax* 145, 151 (Tax 1982), (*citing Riverview Gardens* v. *North Arlington*, 9 *N.J.* 167 (1952)).

Appeals from the Tax Court may be taken to the Appellate Division of the Superior Court. *N.J.S.A.* 2A:3A-10. Finally, the statute expressly provides that the Act "shall be liberally construed to effectuate the purpose and intent thereof." *N.J.S.A.* 2A:3A-29.

The nature and power of the Tax Court has been synopsized in *Weisbrod* v. *Township of Springfield*, 1 *N.J. Tax* 583, 588 (Tax 1980), where the court held that:

> The Tax Court is a court of record, having a seal, and its practices and procedures are as provided by the rules of the Supreme Court. It may grant legal and equitable relief so that all matters in controversy may be determined. Its judges are appointed by the Governor with the advice and consent of the Senate. Its presiding judge is appointed by and is subject to the supervision of the chief Justice. The term of office is co-extensive with judges of the Superior Court, and Tax Court judges can be impeached in the same manner as Superior Court judges. Further, the Tax Court may compel obedience to its process, orders, judgments and sentences in contempt, as fully and amply as the Superior Court. (citations omitted).

New Jersey Court Rule 8:2 sets forth the Tax Court's review jurisdiction:

> (a) General Jurisdiction. The Tax Court shall have initial review jurisdiction of all final decisions including any act, action, proceeding, ruling, decision, order or judgment including the promulgation of any rule or regulation of the County Board of Taxation, the Director of the Division of Taxation, any other state agency or officer (including the Director of the Division of Motor Vehicles) with respect' to a tax matter, or a county recording officer with respect to the realty transfer tax. The Tax Court shall have initial jurisdiction to review those local property tax assessments whose review is sought pursuant to *N.J.S.A.* 54:51A-2 (direct review to the Tax Court of certain appeals).

The tone of the statute and court rule along with the plain language of the statute which gives to the Tax Court authority to "grant legal and equitable relief so that all matters in controversy may be completely determined" make it clear that the legislature

intended to give the Tax Court broad jurisdiction over all claims pertaining to tax assessments.

Although there are no New Jersey cases which have specifically stated that the Tax Court has jurisdiction over § 1983 constitutional issues arising out of a tax appeal several cases have hinted that the Tax Court does indeed have jurisdiction over constitutional issues when those issues fall within the "sphere of the Tax Court's subject matter jurisdiction."

In *Weisbrod, supra*, the defendant contended that the Tax Court did not have jurisdiction to pass upon the constitutionality of the Condominium Act, *N.J.S.A.* 46:8B-1 *et. seq.* The court disagreed and held that it had such jurisdiction because:

> ... the Tax Court has the judicial power to pass upon the constitutionality of a statute where that statute is properly within the sphere of the Tax Court's subject matter jurisdiction.
>
> [1 *N.J. Tax* at 590.]

In *Alid, Inc.* v. *North Bergen Township*, 180 *N.J. Super.* 592 (App. Div. 1981), the Appellate Division held that the Tax Court lacked jurisdiction to entertain a proceeding in lieu of prerogative writ to compel a governing body to exercise a discretionary function because prerogative writs were not within the Tax Court's jurisdiction. But the court stated that, although prerogative writs were not within its jurisdiction, the Tax Court did have broad authority to decide any and all matters that fall with the scope of its authority:

> Thus, the Legislature in providing that
>
> > the tax court, in all causes within its jurisdiction, and subject to law, may grant legal and equitable relief so that all matters in controversy between the parties may be completely determined
>
> was obviously authorizing the court to grant legal and equitable relief" only in those cases lying with its statutory jurisdiction.
>
> [*Id.* at 601-602. *See also Township of West Milford* v. *Van Decker*, 120 *N.J.* 354 (1990), (finding the appropriate remedy

in a case of "egregious" constitutional violation is "to strike the township's assessment.")]

In fact, the court in *Vann*, *supra*, recognized that constitutional issues could and should be addressed in the tax appeal process:

> At the outset, we note that appellant's challenge to the constitutionality of the board's methodology for assessing taxes, in this instance, is inextricably bound to the basic issue of uniformity of assessment of real property located within the county.... The question of whether the board of equalization has the power to resolve relevant constitutional issues in the course of fulfilling its statutory appeals function has been conclusively answered in the affirmative by the Supreme Court of Georgia....
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> An assessment based upon an unconstitutional method of property appraisal would not be valid, and appellant has been deprived, in this instance, of any reasonable opportunity to challenge the constitutionality of the method used to determine the fair market value of his property. This type of issue generates the kind of constitutional question that [*Wilkes* v. *Redding*, 252 Ga. 78, 247 S.E.2d 872] concluded should be addressed in the statutory tax appeal process.
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> [367 *S.E.*2d at 48 (citations omitted).]

Furthermore, since the New Jersey Tax Court has jurisdiction to hear all claims which arise out of a tax assessment, the entire controversy doctrine mandates that all of the plaintiff's claims be heard in the Tax Court.

In *Bung's, supra*, Judge Haines noted that New Jersey law required joinder of the § 1983 claim with the plaintiff's challenge to the sewer improvement assessment under the entire controversy doctrine:

> We do not merely permit the joinder of diverse claims, we demand it under the entire controversy doctrine, which requires all aspects of a controversy to be included in a law suit. *Falcone* v. *Middlesex Co. Med. Soc.*, 47 *N.J.* 92 (1966); *R.* 4.27-1. The Failure to join a relevant claim may constitute its abandonment. *Id.*

[206 *N.J. Super.* at 461.]

Judge Haines applied the rationale of the entire controversy doctrine to the litigation of the plaintiffs' tax claims and concluded that:

> No logic compels the separate consideration of tax claims and civil rights claims arising from the same factual setting. Nor does any decision of the United States Supreme Court or of our courts compel that approach in such cases.
>
> [*Ibid.*]

It is therefore consistent with New Jersey's insistence upon the joinder of diverse claims to require General Motors to bring all claims arising out of the property tax assessment in the Tax Court.

Finally, if General Motors had instituted its § 1983 action in federal court, there is no doubt that the suit would have been dismissed under the Tax Injunction Act because the New Jersey Tax Court affords a speedy and adequate remedy for the relief sought by the plaintiff. It would therefore be anomalous to allow the plaintiff to circumvent the Tax Court, the recognized and established state procedure, by simply filing a § 1983 claim in the Law Division of the Superior Court.[3]

II

IMMUNITY

The defendants argue that, regardless of whether General Motors is entitled to bring a claim under § 1983, the defendants are entitled to absolute immunity and thus are not liable to General Motors under the Civil Rights Act.

In *Monroe* v. *Pape*, 365 *U.S.* 167, 172, 81 *S.Ct.* 473, 478, 5 *L.Ed.* 2d 492, 497 (1961), Justice Douglas, writing for the Court, held that the purpose of § 1983 of the Civil Rights Act is "to give

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[3] Aside from the question of whether the Tax Court has jurisdiction over 1983 claims, is the question of whether, under the facts of this case, the plaintiff may assert a 1983 claim in the first place. In other words, would a decision of the Tax Court to reassess the plaintiff's property provide the plaintiff with a sufficient and adequate remedy to his claim of an improper and incorrect assessment?

a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position." Certain officials, however, such as judges and legislators, are afforded absolute immunity from claims and thus are not subject to suit under the Civil Rights Act.

In *Procunier* v. *Navarette*, 434 *U.S.* 555, 98 *S.Ct.* 855, 55 *L.Ed.* 2d 24 (1978), the Supreme Court synopsized the law as to which government officials are afforded absolute immunity from § 1983 claims and which are afforded only Qualified immunity.

> Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common law immunity afforded government officials. Legislators, judges, and prosecutors have been held absolutely immune from liability for damages under § 1983. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). Only a qualified immunity from damages is available to a state Governor, a president of a state university, and officers and members of a state National Guard. *Scheuer* v. *Rhodes*, *supra*. The same is true of local school board members, *Wood* v. *Strickland*, *supra*; of the superintendent of a hospital, *O'Connor* v. *Donaldson*, 422 *U.S.* 563 (1975); and of policemen, *Pierson* v. *Ray*, *supra*; *see Imbler* v. *Pachtman*, *supra*, at 418-419.
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> [*Id.* at 561, 98 *S.Ct.* at 859, 55 *L.Ed.* 2d at 30.]

In New Jersey, judges are afforded immunity by virtue of the common law, and legislators by virtue of the New Jersey Constitution, art. 4, § 4, par. 9. Both of these immunities are absolute, giving judges and legislators when acting within their jurisdiction and capacity, not only the right to be free from the consequences of suit, but also the right to be free from the burden of defending a suit. This immunity is afforded to them regardless of whether their conduct was the result of a malicious or corrupt motive. *See* 46 *Am. Jur. 2d Judges* § 79 (1969).

The reason for this broad immunity is because:

> It is generally recognized that public officers and employees would be unduly hampered, deterred, and intimidated in the discharge of their duties, if those who act improperly, or even exceed the authority given them, were not protected to some reasonable degree by being relieved from private liability. Accordingly, the rationale for official immunity is the promotion of fearless, vigorous, and effective administration of policies of government. The threat of suit could also deter competent people from taking office. Other public policy considerations which have lead to the policy of immunity for public officers have been identified as the drain and valuable time caused by such actions, the unfairness of subjecting officials to personal liability for the acts of their subordinates, and a feeling that the ballot and removal procedures are more appropriate methods of dealing with the misconduct of public office.
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> [63A *Am. Jur. 2d Public Officers and Employees* § 358 (1984 (footnotes omitted).)

Does a tax assessor have absolute immunity or only a qualified immunity which subjects him to claims for tax assessments made as a result of a malicious or a corrupt motive?

The answer to the question depends on an analysis of the tax assessor's function. If he is considered to be acting in a judicial or legislative role,, then he is entitled to absolute immunity. If he is not, then he is entitled to only a qualified immunity.

The defendants contend that the duties of a tax assessor are akin to that of a judge or legislator and that the tax assessor must therefore be afforded absolute immunity from suit with regard to the tax assessments made by him.

General Motors, on the other hand, contends that a tax assessor acts only in an executive or ministerial capacity, not a legislative or judicial one, and therefore is entitled to only a qualified immunity which is destroyed on a showing of a willful or corrupt motive. It also argues that, even if a tax assessor is normally considered to act in a quasi judicial or legislative role, Frangella did not so act in this matter because his role was limited to hiring the defendant Chaiken and approving his appraisal, and

that in this role, Frangella acted in an executive or ministerial capacity.

There is authority for the contention that a tax assessor has only qualified immunity.

In *American Jurisprudence*, the authors state:

> Tax assessors are not personally liable at common law for errors or mistakes in judgment in making an assessment, even though it is excessive, if it is within their jurisdiction. So long as they act within the scope of their authority as defined by statute, they cannot be held liable to persons who may be injured as the result of the honest exercise of their judgement and determination, however erroneous their judgment may be. Further, the assessment of taxes is a quasi-judicial act, and assessors are protected by the rule that officers performing duties of a judicial nature cannot be called to account for their decisions in any other tribunal.
>
> Although there is some authority that the motive of the assessor in making an excessive assessment is immaterial, in many jurisdictions the immunity of a tax assessor from personal liability prevails only when the assessor acts in good faith. The general rule is that he may be held civilly liable if he makes an unlawful assessment maliciously or corruptly, and in some states statutory or constitutional provisions render the corrupt assessor criminally responsible.
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> [72 *Am. Jur. 2d State and Local Taxation* § 1111 (1974) (footnotes omitted). *See also Brown* v. *Nelson, et al.*, 197 *N.W.* 223 (N.D. 1924); *Western Union Telegraph Co.* v. *Overy*, 142 *S.E.* 509 (S.C. 1927) (holding that a tax assessor may be subject to suit where he acts corruptly, fraudulently or maliciously).)]

However, the New Jersey statutes and case law suggest that a tax assessor, in making property assessments, acts in a quasi judicial or quasi legislative role.

N.J.S.A. 40A:9-148.1 provides:

> A municipal tax assessor... shall have the duty of assessing property for the purpose of general taxation.

N.J.S.A. 54:4-23 provides:

> All real property shall be assessed to the person owning the same on October 1 in each year. *The assessor shall...determine the full and fair value* of each parcel of real property situate in the taxing district at such price as, *in his judgment*, it would sell for at a fair and bona fide sale by private contract an October 1 next preceding the date on which the assessor shall complete his assessments, as hereinafter required.... For the purposes of assessment, the assessor shall compute and determine the taxable value oil such real property at the level established for the county pursuant to law. (Emphasis added).

In *Arace* v. *Irvington*, 75 *N.J. Super*. 258 (Law Div. 1962), the court held that a committee appointed by the town's governing body did not have the right to question the tax assessor as to the manner in which he made his assessments. In doing so, the court articulated the tax assessor's legislative and quasi judicial role:

> The power of taxation is exclusively a legislative function. Therefore, when assessing property, the assessor performs a governmental function and acts as an agent of the Legislature. Pursuant to this power, the Legislature has created the office of municipal assessor for the purpose of valuing property for taxation....
>
> The Legislature, in creating the office of tax assessor has provided with respect to real property that:
>
> > The assessor shall * * * determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for * * *" *N.J.S.A.* 54:4-23.
>
> The above statute is a directive to the assessors to exercise independent judgment in valuing real property. Thus, the assessment of property partakes, in a sense, of a judicial quality. In exercising the *quasi*-judicial functions of his office, the assessor must feel free to make an independent judgment....
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> [*Id.* at 266-267.]

The *Arace* court concluded that, in exercising his judgement in valuing real property, the assessor is acting in a quasi-judicial

authority as an agent of the Legislature. Thus, the court concluded that a tax assessor should be free to exercise his discretion independently. The court stated:

> The assessor, in his relation to the municipality, is in much the same position as a magistrate ... In determining property values, assessors, like judges, should perform their duties without fear or favor. Their *quasi*-judicial duties should be exercised free of pressure and harassment. To insure this protection, they should not be called upon to explain or justify their methods of calculating assessments. Those who feel aggrieved or discriminated against as a result of local assessments are provided with a statutory method of appeal by which their grievances will be heard and determined.[4]
>
> *[Id.* at 269.]

In *Ream* v. *Kuhlman*, 112 *N.J. Super.* 175 (App. Div. 1970), the court held that a local governing body was not permitted to reduce the term of a tax assessor to that which is less than the statutory term fixed by the Legislature. In doing so, the court said:

> The reasons for insulating a tax assessor with a fixed term of office are manifold. His office, an integral part of our state, county and municipal governments, is chargeable with the administration of a statutory systems relating to the levy, assessment and collection of property taxes. He is an agent of the Legislature and his discretionary judgment is reviewable only through the administrative and judicial processes provided by law. Although his jurisdiction is local, his powers and duties are prescribed by the Legislature, and

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[4] It is to be noted however that the court seemed to suggest that a tax assessor has only a qualified immunity from suit.

> The only limitation of the above rule is that the officer not act from an improper or corrupt motive. Furthermore, the decisions of the assessor, being *quasi*-judicial, are not in the absence of fraud or other violation of the law subject to collateral attack.
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> [*Arace, supra*, 75 *N.J. Super.* at 267).]

it is of paramount importance that the integrity oil his office be in no way diluted by local interference.

[*Id.* at 190.]

The statutes which prescribe the qualifications of a tax assessor and the requirement that he be certified as a condition of employment also make it clear that it was the intent of the legislature to make the tax assessor independent and free of the political arena and its influence by insisting that only a "well-qualified person" could be appointed a tax assessor. *N.J.S.A.* 54:1-35.25. *See also Mun. Assessors of N.J.* v. *Mullica Tp.*, 225 *N.J. Super.* 475, 482 (App. Div. 1988) (statutes regulating tax assessor's duties were designed to enhance the assessor's independence).

The preamble to this statute confirms this intent:

> WHEREAS, The local property tax is the major source of revenue in State-local finance in New Jersey; and
>
> WHEREAS, It is certain that the property tax will remain vitally important to New Jersey in the foreseeable future; and
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> WHEREAS, It is essential that the burden of the property tax be distributed equitably among the taxpayers in accordance with the law; and
>
> WHEREAS, it is recognized that no other single factor is so important in insuring the competent and equitable administration of the property tax as that the tax assessment be made by a well-qualified person.
>
> [L.1967. c.44.]

In *Steward* v. *Case*, 54 *N.W.* 938 (Minn. 1893) the court addressed the specific question of whether a tax assessor has absolute immunity and concluded that he does, expressing this rationale for its conclusion:

> The same reason which justifies the rule of exemption in this case of judges of courts applies to assessors, when they are determining the value of property for the purposes of taxation. Protection is not extended to the judge for his own sake, but because the public interest requires full independence of action and decision on his part, uninfluenced by any fear or appre-

> hension of consequences personal to himself, except in so far as he may be accountable to the state for the manner in which he shall discharge the duties intrusted to him. It is also for the public interest that assessors, in determining values for purposes of taxation, should possess the same independence. If they were liable to have the considerations upon when they make the valuations impeached at the suit of every dissatisfied property owner, it is doubtful if men fit to hold the office could be induced to take it. Upon both reason and authority, therefore, we hold that the exemption includes assessors in making assessments to the same extent that it does judges in exercising their judicial functions. The assessment being unimpeachable in this action, in contemplation of law the alleged agreement of combination to make an excessive assessment, even if in so agreeing defendants were acting outside their quasi judicial functions, did not result in any injury to appellant, and without injury the action cannot be maintained. If there were an overvaluation, the law affords another remedy.
>
> [*Id.* at 938-939.]

The statutes and case law make it clear that the role of the tax assessor encompasses attributes of the legislature and of the judiciary. He is, on one hand, an arm of the legislature, performing not merely an administrative function but a legislative one, and on the other hand, an official directed by statute to use his own judgment and thereby acting in a quasi-judicial role. Thus, he is entitled to the same absolute immunity as is afforded to judges and legislators.

The reason that a legislator has absolute immunity is because he must be free to speak and act without fear of criminal and civil liability. Similarly, a judge has absolute immunity because society must ensure the integrity and independence of the judiciary. These reasons equally apply to the tax assessor.

There is also a very practical reason why tax assessors must be afforded absolute immunity and that is because without such immunity a tax assessor would constantly be subject to suits, forced to undergo the rigors of the discovery process, and be liable for

damages all on the mere allegation that he had made a discriminatory assessment.

In this regard, the court's comments in *Anastasio* v. *Planning Board of Tp. of West Orange*, 209 *N.J. Super.* 499 (App. Div. 1986), are appropriate. In that case, the Appellate Division held that planning board members were immune from a § 1983 suit brought by a developer who was aggrieved by the decision of the board. In doing so, the court stated:

> But there is another and more fundamental reason why we should not rule that municipal officials are liable for damages under 42 *U.S.C.A.* § 1983 merely because a reviewing court finds their action in rejecting an application for development under the Municipal Land Use Law was arbitrary and capricious. Frequently in our law a court on an appeal from action of a public agency will determine if the agency acted arbitrarily or capriciously. Accordingly while the words "arbitrary and capricious" may sound harsh, they are simply the standard of appellate review in particular cases. Further, as happened here, New Jersey law granted the victim of such a mistaken action a complete remedy, so there was no derivation of any interest, only a delay. if we held that public officials are liable under 42 *U.S.C.A.* § 1983 merely for erroneously exercising power *under state law remediable under state law*, public officials in this state on all levels would face numerous possible claims and indeed would serve in office at great financial peril.
>
> [*Id.* at 521-522) (emphasis added).]

It of course must be understood that affording absolute immunity to a tax assessor in the making of his appraisals and assessments does not mean that a tax assessor has the authority to do whatever he wishes. He does, in fact, have someone "looking over his shoulder." For example, he is subject to investigation by the Director of the Division of Taxation with respect to his methods,[5] and he is required to give public notice of his assess-

---

[5] When the Director of the Division of Taxation has reason to believe that any property, including the property of railroad and canal companies, has been assessed at a rate lower than is consistent with the purpose of

ment list and to give the public an opportunity to inspect it. *N.J.S.A.* 54:4-38. And of course, the law provides a taxpayer with a plain, speedy and efficient remedy for the correction of an improper tax assessment in the Tax Court. And as with judges and legislators, he is subject to removal and to criminal prosecution for improper or unlawful conduct.

In assessing General Motors' property, the defendant Frangella was clearly acting in his quasi judicial and quasi legislative capacity. Frangella is thus entitled to absolute immunity.

General Motors also argues that, even if the tax assessor is immune from suit, immunity does not extend to the defendant Chaiken, the independent appraiser.

Plaintiff cites as authority for this position the case of *Dennis* v. *Sparks*, 449 *U.S.* 24, 101 *S.Ct.* 183, 66 *L.Ed.* 2d 185 (1980). In that case, the plaintiff brought a civil rights action against a state court judge and others who were alleged to have illegally conspired with the judge to obtain a favorable ruling. The Court dismissed the claim against the judge, holding that he was absolutely immune from suit, but held that his immunity did not extend to the co-conspirators. The *Dennis* case is distinguishable from the instant case. In this case, Chaiken was employed by the City to act as its agent in making property assessments on its behalf. This is a remarkably different situation from that in which private persons corruptly conspire with a judge to violate the law and then seek immunity for that criminal act on the basis that their conspirator has immunity. There is no evidence in this case that Chaiken conspired with the tax assessor and the City to discriminate against the plaintiff. And since his role was that of an agent of the City and of the tax assessor, logic and common sense would dictate that

---

securing uniform taxable valuation of property according to law for the purpose of Taxation, or that the assessment of property according to law in a taxing district is not in substantial compliance with the law and that the interests of the public will be promoted by a reassessment of such property, he may, after due investigation, order or make a reassessment of any property undervalued or a reassessment of all the property in the taxing district. *N.J.S.A.* 54:1-26.

he should be afforded the same absolute immunity from suit for the same reasons, that immunity is given to the tax assessor.

In the case of *Backus* v. *Chilivis*, 224 *S.E.* 2d 370 (Ga. 1976), the Georgia Supreme Court held that aggrieved taxpayers could not bring a § 1983 claim for an alleged unequal assessment against the company who did the appraisal work on behalf of the county. Although the court's decision did not turn on the issue of immunity, the court did make it clear that an independent tax appraisal should be accorded the same protection as that given to one performed by the governmental unit and its employees:

> We hold that the procedures provided by Georgia statutes for resolving ad valorem tax disputes bar taxpayers from instituting a § 1983 action founded only on the claim that the assessments are unequal. A complete remedy for such a defect in a tax digest is already provided by state law...
>
> This conclusion also leads us to rule against a suit for damage's against a private company such as Yoh which has contracted with the county to do appraisal work needed for the ad valorem taxation process. Any irregularities in Yoh's appraisal work affecting appellants would relate only to the equality of the tax assessments. Consequently, § 1993 claim against Yoh for alleged appraisal derelictions in effect seeks to litigate the failure of the county tax digest to conform to legal requirements. The essence of such a claim is unequal taxation. *All the persuasive factors mitigating against permitting § 1983 claims involving county tax officials also apply to a suit against a private company whose appraisal work is performed under the auspices of those officials.*
>
> [*Id.* at 374-375 (emphasis added).]

The attorneys for the defendant Chaiken have succinctly articulated the reason why non-employees hired by the City should be free from suit:

> But beyond the reasoning applied in *Backus*, is the chilling effect which such a ruling would have upon the tax assessment process in municipalities such as and including Linden. No longer could townships or their assessors rely

with confidence upon the advisory roles which appraisal experts often play in the valuation process.

Furthermore, taxpayers could effectively circumvent the tax appeal process by filing damages actions against individuals such as this defendant, whom, while not vested with the control or statutory authority to make tax assessments, were nonetheless involved at some level in that process. Under the guise of "damages" claims, resolution of tax disputes would turn upon the conventional, but perhaps misguided wisdom of a lay person jury in place of a determination by experienced tax court judges knowledgeable about the complex state taxation statutes. At the least, the tax appeal process is subverted, and at the worst it is toppled completely. The possibility of inconsistent results, issue preclusion, bifurcated proceedings and even windfall profits to corporate taxpayers such as GM are readily apparent.

[Brief of Defendant Chaiken, at 39-40.]

Absolute immunity must therefore be afforded to the defendant, Chaiken.

Aside from the immunity issue, General Motors also contends that Chaiken was negligent in making the appraisal on its property and that such negligence constituted a breach of duty owed by Chaiken to both the City and to General Motors as a third party beneficiary to Chaiken's contract with the City. The response to this contention is the following quote from the case of *J.H. Becker, Inc.* v. *Marlboro Tp.*, 82 *N.J. Super.* 519, 530 (App. Div. 1964):

We find no merit in the cause of action brought by Becker against United Appraisal Co. in the second count of its complaint. The defendant had been retained under a contract by the township of Marlboro to revalue the properties in the municipality. Its valuations were not binding upon the township assessor, whom it served only in an advisory capacity. It violated no duty to plaintiff Becker.

III

THE CLAIM AGAINST THE CITY

General Motors contends that the City of Linden is liable to it directly as well as vicariously.[6]

With regard to vicarious liability, this court has determined that the defendant Frangella, the tax assessor, and the defendant, Chaiken, the independent appraiser, are both entitled to absolute immunity. Therefore, since vicarious liability is premised on the liability of the agent or employee, the City cannot be liable to the plaintiff because neither Frangella nor Chaiken are liable to the plaintiff.

But even if there was no immunity, the City would not be vicariously liable to the plaintiff because the City has very limited control over the appointment or functions of the tax assessor, whose role is more akin to that of an independent contractor than that of an agent or employee. As already noted, the City must appoint only persons who have the required qualifications and certifications. *N.J.S.A.* 54:1-35.30; 40A:9-146. And although it may fix his salary and may exercise control over the assessor concerning the time, place and manner in which he works, the City has no voice at all in the method or manner in which he performs his functions. *Horner* v. *Ocean Tp. Comm.*, 175 *N.J. Super.* 533 (App. Div. 1980).

In *Municipal Assessors of N.J.* v. *Mullica Tp.*, 225 *N.J. Super.* 475, 481-482 (Law Div. 1988), the court noted the independence of the tax assessor and the "obvious and overwhelming need" for him to be free from "municipal interference" in making assessments:

> Municipalities have a limited role with respect to assessors so that assessors can carry out their responsibilities free from political pressure and secure in the knowledge that, if they perform their responsibilities as assessors honestly and completely, they need not fear reprisals nor retaliation from municipal officials.

---

[6] It is to be noted that a municipality cannot be held liable for punitive damages. *N.J.S.A.*. 59:9-2(c).

The statutory scheme supports such independence by providing, *inter alia*, that (1) the compensation of the assessor cannot be reduced during his term in office, *N.J.S.A.* 40A:9-146 and 165, and (2) once the assessor is certified pursuant to *N.J.S.A.* 54:1-35.25 and completes four years in office, he can be removed from office only for "good cause" after a hearing before the Direction of the Division of Taxation. *Id.* at 482. Thus, both the statutory and common law are amply designed to permit the tax assessor to perform his tax assessing functions free of municipal influence. *N.J.S.A.* 54:1-35.31.

In short, the City cannot be liable for the performance of a function over which it has no control. Neither Frangella nor Chaiken is therefore liable to the plaintiff.

Nor is the City directly liable to the plaintiff. In order for a municipality to be liable under § 1983, the plaintiff must show that three conditions have been met. First, the municipality must be "actually responsible" for the questioned conduct. "Second, only those municipal officials who have final policy making authority may, by their actions, subject the government to § 1983 liability" And third, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." *City of St. Louis* v. *Praprotnik*, 485 *U.S.* 112, 123, 108 *S.Ct.* 915, 924, 99 *L.Ed.* 2d 107, 118 (1988).

General Motors fails to satisfy any of these criteria. As to the first criterion, the City is not "actually responsible" for the tax assessment because the tax assessor acts independently of the City. The second criterion is therefore irrelevant because there is no need to reach the question of which municipal official has "final policy making authority." And thirdly, although General Motors alleges that the Mayor made statements suggesting a conspiracy against General motors, any such statement is irrelevant because the Mayor was not "the official... responsible under state law for making policy in that area of the City's business."

The City, therefore, has neither direct-nor vicarious liability to the plaintiff.

IV

CONCLUSION

Finally, it is to be noted that, even if this suit were maintainable because Frangella and Chaiken had only qualified immunity, this court is of the opinion that the plaintiff's proofs are nevertheless woefully inadequate and could not sustain a cause of action. General Motors' allegations at best indicate a bad appraisal and neglectful and indifferent public officials, but they do not rise to the level required as to sustain a cause of action under § 1983 of the Civil Rights Act.

Put another way, General Motors' conclusory allegations are lacking, and even though presented, if one will excuse the literary license, with "sound and fury," signify nothing.

Accepting all the allegations of General Motors as true and giving it all inferences to which it is entitled, the proofs demonstrate only a shoddy appraisal, not a wicked one.

Motion granted.

APPENDIX D

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, the following is a list of the non—wholly owned subsidiaries of petitioner General Motors Corporation.

2000 Aircraft Credit AB
ABA Motriz Financiamiento S.A. de C.V.
ABS Application Systems (Pty) Ltd.
ABS Computer Sales (Pty) Ltd.
ABS Computer Services (Pty) Ltd.
ABS Computer (Pty) Ltd.
ABS Information Technology (Pty) Ltd.
ACCSCO S.A.
Aeronautical Systems Designers Limited
AeroVironment, Inc.
Agora s.r.l.
Alambrados y Circuitos Electricos, S.A. de C.V.
Alpha Trans Leasing Verwaltungsgesellschaft mbH
AMBRAKE Corporation
American Mobile Satellite Corporation
AMRAAM International Licensing Company
Applied Intelligent Systems, Inc.
Aralmex, S.A. de C.V.
ARINC Incorporated
Aristaoom International, Inc.
ASEC Manufacturing
ASEC Sales
Asset Leasing GmbH
Aura S.r.l.
Autocable Industries (Pty) Limited
Automobile Battery Manufacturing, Inc.
Automotive Polymer-Based Composites
Autos y Maquinas del Ecuador S.A. (AYMESA)
Banque Opel
Rasintel S.p.A.
Beijing International Information Processing Company Limited
Beijing WY-GM Automotive Electronic Control Co., Limited

BSS Belgique
BSS Greece
Bujias Mexicanas, S.A. de C.V.
Calsonic Harrison Co., Ltd.
CAMI Automotive, Inc.
Canmax Inc.
Carus Grundstucks - Vermietungsgesellschaft mbH & Co.
CEI Co., Ltd.
China Management Systems Corporation
Cilva Holdings Plc
Cirnflex Teknowledge
CLIOR
Coalition Undertaking Remedial Efforts, Inc.
COGSYS Limited
Compagnie des Faisceaux Tunisiers International S.A.
Compania Nacional de Direcciones Automotrices, S.A.
Componentes Delfa, C.A.
Comtrac Corporation
Controladora General Motors, S.A. de C.V.
Controladora Mexicana de Autopartes, S.A. de C.V.
Convergent Corporation
Daewoo Automotive Components, Ltd.
Database Software S.p.A.
Delkor Corporation (aka Chusikhoesa Delkor)
Delphi Ensamole de Cubiertas Automotrices, S.A. de C.V.
Delphi Packard Electric Venezuela C.A.
Delphi Vestiduaras Fronterizas, S.A. de C.V.
Detroit Diesel Corporation
DHB - Componentes Automotivos S.A.
Diavia S.r.l.
DIRECTV Japan Kabushiki Kaisha
Doug Fox Parking, Inc.
DR DE CHIHUAHUA, S.A. de C.V.
DRB s.a./n.v. (a.k.a. Delco Remy Belgique)
Earth Observation Satellite Company
EDESA Societe Anonyme Holding
EDS-Padcom Clinical Research Beteiligungs GmbH
EDS Africa Limited
EDS Industries S.A.
EDS South Africa (Pty) Ltd.

EDS Vanco (Pty) Ltd.
Electrical Wiring Component Applications Partnership
Electronic Data Systems (EDS) Israel, Ltd.
Empresa Mixta GEMACVEN, S.A.
Empresa Nacional de Optica S.A.
Empresas "Ca-Le" de Tiaxcala, S.A. de C.V.
EPEC S.A. (a.k.a. Ericson Packard Electric Componentes S.A.)
Europe Assurance Informatique S.A.
E.A.I. - Europe Assurance Informatique
Fabrica Nacional De Autobuses, C.A.
First Portland Technology Corp.
FLIR Systems, Inc.
Fox Travel Institute, Inc. (The)
France Informatique Juridique S.A.
Freevale Limited
Galaxy Latin America
Genasys L.C.
General Motors Colmotores, S.A.
General Motors de Argentina S.A.
General Motors Eygpt, S.A.E.
General Motors India Limited
General Motors Kenya Limited
Genie Mecanique Zairois, S.A.R.L.
GESTHELP Huissier
GFI-TB la Mondiale Bull S.A.
GM-Saab Communication GmbH
GM Credit AB
GM Finance HB
GM Nigeria Limited
GM Ovonic L.L.C.
GMA [illegible] Argentina S.A.
GMB Belgique
Gulado y Control S.A.
G. & F. Company
G.M.A.C. Financiera de Colombia S.A. Compania de Financiamiento Comercial
H & D Radio Frequency Identification Products
H & R Company
HBH Company
Hitachi Data Systems Holding Corporation

HKV
HMK
Hughes-JVC Technology Corporation
Hughes-Kenwood RDSS, Inc.
Hughes-Pareto Research Partnership
Hughes Arabia Limited
Hughes Escorts Communications Limited
Hughes Ispat Limited
Hughes Olivetti Telecom, N.V.
Hughes Software Systems Private Limited
i-Logix Inc.
IBC Vehicles Limited
IBC Vehicles (Distribution) Limited
Industries Mecaniques Maghrebines, S.A.
Industrija Delova Automobile, Kikinda
Information Systems Solutions (Pty) Ltd.
Infosys
Insurance Software Solutions Corporation
Integrated Multimedia Solutions, Inc.
Interbank On-Line System Ltd.
International Electro-Optical Industry Anonim Sirketi
IRISS Company
Istiservice
Istituto R.S.O.
Isuzu-General Motors Austria Limited
Isuzu Motors Limited
ITC Inland Teknik Oto Yan Sanayi Limited Sirketi
ITT Automotive Electrical Systems, Inc.
I.K. Coach Co., Ltd.
Japan Network System
Japan Satellite Communications Network Corporation
Japan Systems Company Limited
Jinbei GM Automotive Co. Ltd.
Justirian Investments Sixteen (Pty) Ltd.
Kabeltrommel GmbH & Co. KG
Katoon, S.A. de C.V.
KDS Company, Ltd.
K.C.E. Company, Limited
KK. J.C.I.S.
K.K. Nihon Game Cards

LG-EDS Systems, Inc.
Low Emission Paint Research and Development Partnership
Lufthansa Systems GmbH
Macopel S.A. de C.V.
Management Technologies, Inc.
MCE
Metal Casting Technology, Inc.
Microelectronics and Computer Technology Corporation
MLT Holding Limited Partnership
M&DY Corporation (Pty) Ltd.
National Marketing Company
Neodata Corporation
New Cure, Inc.
New Dimension Software Ltd.
New United Motor Manufacturing, Inc.
New Venture Gear, Inc.
Nippon Avionics Co., Ltd.
Nippon EDS Company, Ltd. (a.k.a. Nippon EDS Kabushiki Kaisha)
North American New Cars, Inc.
Oel Systems (Pty) Ltd.
OGIP ORGANISATION SARL
Omnibus BB Transportes, S.A.
One Touch Systems, Inc.
Opel-Automobilwerk Eisenach-PKW GmbH (a.k.a. Opel-AWE GmbH)
Opel-Handler Versicherungsdienst GmbH
Opel-Wohncau GmbH
OPEL Bankgesellschaft m.b.H.
Opel France S.A.
OPEL Leasinggesellschaft m.b.H.
Packard CTA Pty. Ltd.
Packard Electric Baicheng
Packard Electric Hebi
Packard Electric Vas kft
PDES, Inc.
Postal Buddy Corporation
Progical S.A.
Promotora de Partes Electricos Automotrices
Promotora S.A. de C.V.

PT General Motors Buana Indonesia
PT. Pasifik Satelit Nusantara
P.T. GMAC Lippo Finance
P.T. Mesin Isuzu Indonesia
RALS (a.k.a. RAM Alternate Launcher System)
Rio Bravo Electricos, S.A. de C.V.
Riser Foods, Inc.
Robotic Vision Systems, Inc.
Ruedas de Aluminio, C.A.
S O N I A S.A. A Directoire
Saab Automobile AB
SAFRI
Satelitron S.A. de C.V.
Serampang Hughes Sdn.Bhd.
Shanghai Hughes Network Systems
Shinsung Packard Company, Ltd.
Simpad, Sociedad Anonima de Capital Variable
Sipe Optimation S.p.A.
Sistemas de Asientos para Vehiculos Automotrices, S.A. de C.V.
Sistemi & Technologie S.p.A.
SJ & LA Associates
Sociedad de Comercializacion Intercional Colmotores S.A.
Societe Auciliare Put Le Financement et Les Realisations Industrielles
Societe Flerienne De Participations
Societe Francaise des Amortisseurs de Cabon S.A.
Spectra Securities Software Inc.
Standard Missile Company, L.L.C.
Subarban Limited Liability Company
Sabaru-Isuzu Automotive, Inc.
Sung San Company, Ltd.
Supercomputer Automotive Applications Partnership
Suzuki Motor Corporation
SV-EDS Technology Services, Ltd.
Synon Italia s.r.l.
Systems & Management S.p.A.
SYSTER-Informatique
Telemac S.A.R.L.
Telemesures Acoustiques Talemac S.A.R.L.
Teramira Holdings, Inc.

The Gulf Industrial Technology Company (KSC)
Translant, Inc.
UKADGE Systems Limited
UMW-EDS Technology Sdn. Bhd.
UMW Holdings Berhad
United Australian Automotive Industries Limited
United States Automotive Materials Partnership
UPE Systems Services Sdn. Bhd.
Uveral S.A.
U.M.I. Universal Motors Israel Ltd.
Video Lottery Technologies, Inc.
View Engineering, Inc.
Volvo GM Canada Heavy Truck Corporation
Volvo GM Heavy Truck Corporation
White House Consulting (Pty) Ltd.
White House Midrange Services (Pty) Ltd.
White House Technologies (Pty) Ltd.
Woodbridge Foam Deutschland, GMBH
Worldmaster Marketing Pty Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.

(2)

Supreme Court, U.S.
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JUN 28 1996
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No. 95-1930

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

CITY OF LINDEN, THE ASSESSOR OF LINDEN, AND RICHARD CHAIKEN, Agent, Servant or Employee of Linden,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF LINDEN AND ASSESSOR OF LINDEN

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the New Jersey Supreme Court was correct in concluding that, in light of the remedies available to aggrieved taxpayers under state law, dismissal of plaintiff's federal civil rights suit was required by *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995).

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COUNTERSTATEMENT OF THE CASE

1. Petitioner General Motors Corporation (GM) owns a large automobile assembly plant in Linden, New Jersey. From August 1985 to August 1986, GM stopped production at the plant to transform it into one capable of producing "uni-body" automobiles, rather than "large chassis" automobiles that were previously produced. To do this, GM gutted the plant of its machinery and equipment, retooled the plant and added 200,000 square feet to the existing 2.2 million square-foot area. The cost of this modernization project was $350 million. Psa135-36, 203, 466.[1]

As a result of the project, the tax assessor for respondent City of Linden (the City) was required by statute to place an added assessment on the property reflecting the difference between the assessed value of the property before, and the fair assessable value after, its improvement. N.J.S.A. 54:4-63.1 to 54:4-63.11. An added assessment is imposed on an annualized basis and prorated for the existing tax year.

The City's tax assessor was respondent Emanuel Frangella. He had held that position for more than 20 years and was familiar with the GM plant as it existed prior to the $350 million modernization project. Because of the complexity of the project, however, Frangella

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[1] Citations to "Pa" refer to GM's appendix in the New Jersey Superior Court, Appellate Division. Citations to "Psa" refer to GM's supplemental appendix in the Appellate Division.

Because of a typographical error, the opinion of the New Jersey Supreme Court states that the cost of the reconstruction was $3.5 million rather than $350 million. 3a.

advised the City to retain respondent Richard Chaiken as an expert to assist in the analysis. Chaiken was a professional appraiser/tax consultant who had been involved in real estate appraisal since 1963. He was well-acquainted with GM's Linden plant, having performed analyses there for tax assessments in 1983, 1984 and 1985. Psa95, 97-98, 163, 218.

Contrary to the assertions of the Petition, the determination of the 1986 added assessment was not made on the basis of "highly irregular methodology" (Petition at 2) or without relevant data or analysis. Chaiken already had information in his computer in connection with the GM plant as a result of his inspections in previous years, and that information was used for purposes of the 1986 analysis. Chaiken was also familiar with other industrial and commercial real estate in the City. In addition, Frangella and Chaiken toured the reconstructed plant for a half day with representatives of GM. Psa97-98, 168.

After their tour of the plant, Frangella and Chaiken met to determine the amount of the added assessment. Chaiken concluded that the reconstruction had created a modern, state-of-the-art facility that was "virtually a new building." Psa172. Based upon his extensive experience, Chaiken knew that it would cost at least $55 to $60 per square foot to build a new industrial facility. *Id.* Therefore, Chaiken told Frangella that the reconstructed plant "was worth at least fifty-five to sixty dollars a square foot, and probably as much as one hundred [dollars] and upwards a square foot. . . . " Psa169. *See also* Psa98. In making this determination, Chaiken took into account his familiarity with the GM plant, obtained from his inspections during the previous years. Psa185.

Although Chaiken believed that the value of the plant may have exceeded $100 per square foot because of the plant's "many, many special features," he advised Frangella to use the minimum figure of $55 to $60 per square foot, which was appropriate for "a basic shell good grade industrial facility in New Jersey." Psa172-73. Frangella followed Chaiken's advice, even though he believed that an added assessment of $55 to $60 per square foot was "a very conservative estimate." Psa98. *See also* Psa1063. Accordingly, Frangella imposed an added assessment of $17,690,000, prorated to $5,896,667 for the 1986 tax year. Psa99.

In a December 8, 1986 letter report to Frangella, Chaiken set forth the methodology he employed. Chaiken estimated that a 2.2 million square-foot facility would cost between $55 and $100 per square foot to build – "perhaps even more when we consider all the special features built-into this facility." Psa213. This analysis did not take into account the 200,000 square feet that had been added to the plant during the reconstruction. Psa98, 212-13. Chaiken computed the added assessment as follows:

	[At $55 per sq. ft.		At $100 per sq. ft.]
IMPROVEMENTS:	$121,000,000	to	$220,000,000
SITE IMPVTS:	7,500,000	to	15,000,000
	$128,500,000	to	$235,000,000
ACCRUED DEP:	15,250,000	to	25,000,000
DEPRECIATED VALUE:	$113,250,000	to	$210,000,000
ASSMTS @57.76% =	$ 65,413,200	to	$121,296,000
LESS ASSMTS:	44,526,200	to	44,526,200
ADDED ASSMTS:	20,887,000	to	76,769,800

Psa213.

In his report, Chaiken stated in italics: "*The ADDED ASSESSMENT should have been no less than $20,887,000,*" rather than the $17,690,000 that had been imposed. Psa213 (emphasis in original). Chaiken advised Frangella that "[w]e must have used the wrong ratio in our earlier calculations . . . or made some other sort of math error." Psa213. The error was in GM's favor and was never corrected.

2. GM appealed the 1986 added assessment to the Union County Board of Taxation (County Board). At the hearing before the County Board, GM valued the plant – which had been reconstructed at a cost of $350 million – at only $20 million for tax purposes because "[t]he majority of that three hundred million applies to machinery and equipment." Psa152. GM maintained that most of the improvements to the plant constituted "nontaxable personal property," as opposed to "real property improvements." Psa494. On that basis, GM sought to reduce the added assessment from $17,690,000 to $100,000, with a corresponding reduction in the prorated portion of the added assessment from $5,896,667 to $33,333. Psa1056. After hearing extensive testimony, the County Board upheld the added assessment. Psa938.

GM appealed that judgment to the Tax Court of New Jersey, where the matter has been consolidated with subsequent GM appeals and is still pending. If GM loses in the Tax Court, it can appeal to the New Jersey Superior Court, Appellate Division. If GM prevails on appeal, it will receive, within 60 days of the final judgment, a full refund of any excess tax paid plus 5% interest. N.J.S.A. 54:3-27.2.

GM had also filed appeals, pursuant to N.J.S.A. 54:3-21, with respect to taxes imposed for 1983, 1984 and 1985. After a 40-day trial, those assessments were not only upheld but increased by the Tax Court in 1991. *General Motors Corp. v. City of Linden*, 13 N.J. Tax 324, 325 (App. Div.) (per curiam), *certif. denied*, 134 N.J. 561, 636 A.2d 519 (1993); *General Motors Corp. v. City of Linden*, 12 N.J. Tax 24 (Tax Ct. 1991). In its Petition, GM claims that its "position was vindicated on appeal when the Appellate Division . . . reversed the Tax Court decision and remanded for reconsideration" (Petition at 2), but that statement is highly misleading.[2]

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[2] While GM's appeal of the 1983-1985 taxes was pending in the Appellate Division, two significant developments occurred: (1) the New Jersey Supreme Court issued a decision – *Ford Motor Co. v. Township of Edison*, 127 N.J. 290, 604 A.2d 580 (1992) – that overturned a "basic predicate" of the Tax Court's decision; and (2) the New Jersey Legislature enacted the Business Retention Act, N.J.S.A. 54:4-1.13 to 54:4-1.16, which rejected certain Tax Court decisions that had broadly interpreted the definition of real property under New Jersey's tax laws. *General Motors Corp. v. City of Linden*, 13 N.J. Tax at 325-29. Because these developments occurred after the Tax Court's decision in the GM matters and "seriously undermined the conceptual basis of the Tax Court's reasoning," the Appellate Division reversed the Tax Court's decision regarding the 1983, 1984 and 1985 assessments and remanded for reconsideration in light of the new decision and the new statute. *Id.* at 325.

Contrary to the implication of the Petition, the Appellate Division did not consider the ultimate issue of the propriety of the 1983, 1984 and 1985 assessments. In fact, GM and the City are still litigating that issue, and those cases have been consolidated with GM's appeals of the tax assessments for each year from 1986 through 1994. Early this year, the Tax Court, on

3. On October 1, 1987, while its appeal of the 1986 added assessment was pending before the County Board, GM filed suit in the New Jersey Superior Court, Law Division, against the City, the City's tax assessor (unidentified by name) and Chaiken. Relying upon 42 U.S.C. §1983, GM claimed that defendants violated its constitutional rights because the 1986 added assessment was allegedly "discriminatory, arbitrary, capricious and unconstitutional." Pa2. Contrary to the implication of the Petition, GM did not allege that the 1986 added assessment was imposed in retaliation for GM's filing of tax appeals in previous years.

GM thereafter filed a three-count amended complaint in which it added new claims, primarily against Chaiken. Pa15. Most notably, the third count demanded an award of punitive damages against Chaiken; GM has never demanded punitive damages from Frangella or the City.[3] *Compare* Pa17 & Pa18 *with* Pa19. Moreover, as was the case with the original complaint, the amended complaint did not allege a retaliatory motive.

It was not until 1990, in opposition to defendants' motion for summary judgment, that GM asserted that the 1986 added assessment was imposed in retaliation for

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remand from the Appellate Division, granted partial summary judgment in favor of the City, declaring unconstitutional (under the New Jersey Constitution) a portion of the Business Retention Act. *General Motors Corp. v. City of Linden*, Nos. 20-09091A2-83D etc. (N.J. Tax Ct. Jan. 4, 1996).

[3] There can be no § 1983 recovery of punitive damages against a municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

GM's filing of tax appeals in previous years. Contrary to GM's statements in the Petition, the City's mayor did not provide support for this assertion by "stat[ing] (with astonishing candor) that '[t]he additional increased assessment was placed on General Motors' plant because [GM] filed the tax appeal.' " Petition at 2. Rather, two GM employees stated in affidavits that the mayor had made such a statement at a meeting in 1989. Psa564-65; 566-67. The mayor submitted a responsive affidavit denying that he made any such statement. Psa1115-16. Frangella and another person present at the meeting agreed with the mayor. Psa1113-14; 1117-18.

The Superior Court of New Jersey, Law Division, entered summary judgment in favor of all three defendants. 31a-56a. The Superior Court of New Jersey, Appellate Division, reversed in material part. *General Motors Corp. v. City of Linden*, 279 N.J. Super. 449, 653 A.2d 568 (App. Div. 1995); 14a-30a. The New Jersey Supreme Court, in a unanimous opinion, reversed the decision of the Appellate Division and remanded the matter to the Law Division for entry of a judgment of dismissal. *General Motors Corp. v. City of Linden*, 143 N.J. 336, 671 A.2d 560 (1996); 1a-13a.

4. In its opinion, the New Jersey Supreme Court held that GM's lawsuit, which sought relief under 42 U.S.C. §1983 for the allegedly unconstitutional added assessment, failed to assert a viable cause of action. The court concluded that New Jersey's tax system provides an adequate remedy for unconstitutional tax assessments. 11a-12a. Because the remedy is adequate for constitutional purposes, the court applied *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351

(1995), and concluded that claims involving state tax administration are not actionable under §1983 in New Jersey courts. 2a-3a, 5a-7a.

REASONS FOR DENYING THE WRIT

THE NEW JERSEY SUPREME COURT WAS CORRECT IN CONCLUDING THAT NEW JERSEY'S TAX SYSTEM PROVIDES AN ADEQUATE REMEDY FOR UNCONSTITUTIONAL TAX ASSESSMENTS AND THAT, THEREFORE, GM'S FEDERAL CIVIL RIGHTS CLAIMS ARE BARRED FROM NEW JERSEY'S COURTS BY *NATIONAL PRIVATE TRUCK COUNCIL.*

In *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351, 2354 (1995), the issue was "whether, in tax cases, state courts must provide relief under §1983 when adequate remedies exist under state law." The Court answered the question "no," at least insofar as the requested §1983 relief is of a declaratory or injunctive nature: "When a litigant seeks declaratory or injunctive relief against a state tax pursuant to §1983, . . . state courts, like their federal counterparts, must refrain from granting federal relief under §1983 when there is an adequate legal remedy." *Id.* at 2357.

The Court thus extended to state courts the reasoning of *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). In *Fair Assessment*, plaintiffs sought to recover, under §1983, actual damages in the amount of overassessments and punitive damages of $75,000 from each defendant. 454 U.S. at 106. The Court held that "Congress never authorized federal courts to entertain damages actions under §1983 against state taxes when

state law furnishes an adequate legal remedy." *National Private Truck Council*, 115 S. Ct. at 2354-55 (describing the holding in *Fair Assessment*). The Court in *Fair Assessment* concluded that excluding tax-related §1983 damages actions from federal court is necessary to prevent severe disruption of state tax systems:

> In addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme. As the District Court in [*Fair Assessment*] stated:
>
> > "To allow such suits would cause disruption of the states' revenue collection systems *equal to that caused by anticipatory relief.* State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well as prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property."

Fair Assessment, 454 U.S. at 114 (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 478 F. Supp. 1231, 1233-34 (E.D. Mo. 1979)) (emphasis added).

Referring to the Tax Injunction Act and the principles that underlie that statute,[4] the Court stated:

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[4] The Tax Injunction Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

> The statute "has its root in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.

Fair Assessment, 454 U.S. at 110 (citations omitted).

The Court further explained:

> We discern no significant difference, for purposes of the principles recognized in this case, between remedies which are 'plain, adequate, and complete,' as that phrase has been used in articulating the doctrine of equitable restraint, and those which are 'plain, speedy and efficient,' within the meaning of §1341 [i.e., the Tax Injunction Act].

Fair Assessment, 454 U.S. at 186 n.8.

The Court in *National Private Truck Council* found the decision in *Fair Assessment* to be "[o]f particular relevance" even though the §1983 action in *Fair Assessment* included claims for damages while the §1983 action in *National Private Truck Council* did not. 115 S. Ct. at 2354. The Court noted that the exclusion of tax-related §1983 actions from *federal* court applies not only to actions for declaratory or injunctive relief but also to actions for compensatory and punitive damages. 115 S. Ct. at 2354-55. The Court then explained:

> Just as *Fair Assessment* relied upon a background principle in interpreting §1983 to preclude damage actions in tax cases brought in federal court, so we rely on the same principle in interpreting

> §1983 to provide no basis for courts to award injunctive relief when an adequate legal remedy exists. Our interpretation is supported not only by the background principle of federal noninterference discussed in *Fair Assessment*, but also by the principles of equitable restraint discussed at length in that case. *Whether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this way.*

115 S. Ct. at 2356 (emphasis added) (citation omitted).

Thus, contrary to GM's approach, the application of *National Private Truck Council* does not require a mechanical comparison of the remedies sought by the plaintiffs in that case with the remedies sought by GM in its New Jersey state court action. *See* Petition at 11, 14-19. What is required is an application of the Court's holding that §1983 cannot be permitted to disrupt a state's tax system unless that system fails to provide an aggrieved taxpayer with an adequate legal remedy.

To be "adequate," a state-court remedy must merely meet "certain minimal *procedural* criteria." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981) (emphasis by Court). These criteria are satisfied if a state-court refund procedure "provides the taxpayer with a 'full hearing and judicial determination' at which he may raise any and all constitutional objections to the tax." *Id.* at 514 (quoting *LaSalle Nat'l Bank v. County of Cook*, 57 Ill. 2d 318, 324, 312 N.E.2d 252, 255-56 (1974)). *See also id.* at 515 n.19.

The New Jersey Supreme Court applied this precedent and correctly concluded that New Jersey's tax system provides an adequate remedy for unconstitutional

tax assessments. 9a-12a. Contrary to GM's argument (Petition at 8), the court did not evaluate the adequacy of the remedy "solely" on the availability of a refund. Rather, the court first noted that the "minimal procedural criteria" are satisfied because "New Jersey law provides several opportunities for taxpayers to raise constitutional objections to an added assessment." 11a. The taxpayer may challenge the added assessment before the applicable county board of taxation and on appeal to the Tax Court and beyond. 11a-12a. If the taxpayer ultimately prevails on its claim that the added assessment was excessive, it is entitled to a full refund plus 5% interest. 12a (citing N.J.S.A. 54:3-27.2).

The §1983 remedies sought by GM (compensatory and punitive damages) are the *same* as those which were sought by the plaintiffs in *Fair Assessment*. It is clear from the Court's reliance on *Fair Assessment* in *National Private Truck Council* – a case that did *not* involve those remedies – that *Fair Assessment* directs the result in the present case, which *does* involve those remedies. Thus, to paraphrase *National Private Truck Council*, when a litigant seeks damages against a state tax pursuant to §1983, state courts, like their federal counterparts, must refrain from granting federal relief under §1983 when there is an adequate legal remedy. *See National Private Truck Council*, 115 S. Ct. at 2357. *See also Kerr v. Waddell*, 1996 WL 192001 (Ariz. App. Apr. 23, 1996) at * 5 ("Although *National Private Truck Council* did not specifically address whether courts could award damages under §1983 in state tax cases, we interpret it to forbid an award of damages for the same reasons that injunctive and declaratory relief are

forbidden") (footnote omitted); *Buckley Powder Co. v. Colorado*, 1996 WL 97831 (Colo. App. Mar. 7, 1996), *reh'g denied* (Apr. 11, 1996), at * 6 (*National Private Truck Council*'s citation to *Fair Assessment* means, by implication, that state courts cannot entertain §1983 claims for monetary relief if state tax procedure provides an adequate remedy).

Furthermore, as the New Jersey Supreme Court recognized (10a-11a), the refund-plus-interest remedy is adequate substantively even though it is not identical to the relief that would be available under §1983. "[T]he States are afforded great flexibility in satisfying the requirements of due process in the field of taxation. As long as state law provides a 'clear and certain remedy,' the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)." *National Private Truck Council*, 115 S. Ct. at 2354 (quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36-37, 51 (1990)).

In *Rosewell* – a §1983 case – the state system provided for refunds *without* interest. The Court nevertheless found that remedy to be adequate, noting that when Congress passed the Tax Injunction Act, it

> knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy. . . .
>
> It is only common sense to presume that Congress was also aware that some of these same States did not pay interest on their refunds to taxpayers, following the then-familiar rule that

> interest in refund actions was recoverable only when expressly allowed by statute.

Rosewell, 450 U.S. at 523.

By providing a refund *plus interest*, the New Jersey system "is more favorable to the taxpayer" than the system that was found to be adequate in *Rosewell*. *California v. Grace Brethren Church*, 457 U.S. 393, 414 n.31 (1982). Obviously, therefore, the refund-plus-interest remedy is adequate. *Id.* at 417 (finding the refund-plus-interest remedy under California law to be adequate and holding that the federal district court "had no jurisdiction to issue injunctive or declaratory relief"). *See also National Private Truck Council*, 115 S. Ct. at 2355 (plaintiff *conceded* that the state had offered "an adequate remedy in the form of refunds").

The Court has long recognized that a refund is an adequate remedy, the availability of which requires *federal* courts to dismiss tax-related §1983 actions. In *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court relied upon the "spirit" of the Tax Injunction Act to bar federal declaratory judgment actions regarding the constitutionality of state taxes. *National Private Truck Council*, 115 S. Ct. at 2354. The *Great Lakes* Court held that because a refund is an adequate remedy, such actions must be dismissed on the basis of federalism, comity and equitable restraint:

> With due regard for these considerations, it is the [federal] court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to

> recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

319 U.S. at 300-01.

In *McKesson*, the Court again held that a refund is an adequate remedy:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.
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> * * *
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> [The State] may satisfy this obligation through any form of relief, *ranging from a refund of the excess taxes paid* by petitioner to an offsetting charge to previously favored [taxpayers]. . . . The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31, 51-52 (1990) (footnotes omitted) (emphasis added).

The adequacy of a refund as a legal remedy is also evident from the Court's opinion in *National Private Truck*

Council. The Court indicated that "there may be extraordinary circumstances under which injunctive or declaratory relief is available even when a legal remedy exists." 115 S. Ct. at 2357 n.6. The Court then described one such "extraordinary circumstance":

> Thus, if a state court awards a refund to a taxpayer on the ground that the tax violates the Federal Constitution, but state tax authorities continue to impose the unconstitutional tax, injunctive and declaratory relief might then be appropriate. In such circumstances, the remedy might be thought to be "inadequate."

Id. The clear implication of the Court's hypothetical is that a refund is an adequate legal remedy unless a state's tax authorities continue to impose the unconstitutional tax – in which case the remedy might need to be supplemented by injunctive and declaratory relief.

Furthermore, as the New Jersey Supreme Court recognized, "courts should construe narrowly the exception to the requirements of an adequate remedy." 9a (citing *California v. Grace Brethren Church*, 457 U.S. at 413). The reason underlying the need for a narrow construction of that exception is, again, the need to "be faithful to the congressional intent to 'limit drastically' " judicial interference with state tax systems. *California v. Grace Brethren Church*, 457 U.S. at 412-13.

The Court's decision in *National Private Truck Council* has uniformly been interpreted to mean that a refund-plus-interest remedy is adequate for constitutional purposes and, consequently, that state courts cannot entertain §1983 actions in tax matters where such a remedy is available. Like the New Jersey Supreme Court, other state

courts have given life to the affirmation that "[t]he States are afforded great flexibility in satisfying the requirements of due process in the field of taxation." *National Private Truck Council*, 115 S. Ct. at 2354. *See Jade Aircraft Sales, Inc. v. Crystal*, 236 Conn. 701, 708-09, 674 A.2d 834, 838 (1996) (although remedy provided by Connecticut's tax system does not allow for monetary damages or attorney's fees and provides only one month within which to appeal a tax assessment, the refund-plus-interest remedy is adequate); *PPG Indus., Inc. v. Tracy*, 74 Ohio St. 3d 449, 452, 659 N.E.2d 1250, 1252 (1996) (per curiam) (because Ohio's tax system provides an appellate procedure to determine constitutional claims, there is an "adequate remedy at law" and thus no right to receive attorney's fees under 42 U.S.C. §1988); *Kerr v. Waddell*, 1996 WL 192001 (Ariz. App. Apr. 23, 1996) at * 1 (vacating previous opinion in light of *National Private Truck Council* and holding that "[b]ecause Arizona's administrative tax procedure is an adequate legal remedy that was not exhausted in this case, . . . the trial court lacked subject matter jurisdiction to hear these claims"); *Buckley Powder Co. v. Colorado*, 1996 WL 97831 (Colo. App. Mar. 7, 1996), *reh'g denied* (Apr. 11, 1996), at * 6 (Colorado's tax system provides adequate remedies because it provides for declaratory and injunctive relief and administrative remedies including refunds). *See also Garrett Group, L.P. v. County of Schuylkill*, 667 A.2d 255, 257 n.5 (Pa. Commw. 1995) (noting taxpayers' voluntary dismissal at oral argument of their §1983 claims in view of *National Private Truck Council*); *Sharp v. Direct Resources for Print, Inc.*, 910 S.W.2d 535, 541 (Tex. App. 1995), *error denied* (Apr. 4,

1996) (noting taxpayer's recognition that refund was an adequate remedy).

GM suggests that, in any event, the New Jersey procedures do not give taxpayers an adequate opportunity to obtain refund-plus-interest relief. According to GM, the grant or denial of relief is entrusted to inferior tribunals of limited jurisdiction, assessments can be challenged only if they are well in excess of taxable value, and unconstitutional assessments enjoy a strong presumption of correctness. Nothing could be further from the truth.

New Jersey's county boards of taxation are independent, quasi-judicial entities whose members are appointed by the Governor and confirmed by the State Senate. Members of the county boards of taxation are chosen "because of their special qualifications, knowledge and experience in matters concerning the valuation and taxation of property, particularly of real property." N.J.S.A. 54:3-2. Similarly, the Tax Court of New Jersey is a statewide court whose members are appointed by the Governor and confirmed by the State Senate. Its judges have the same tenure of office as judges of the Superior Court and are required to be chosen "for their special qualifications, knowledge and experience in matters of taxation." N.J.S.A. 2B:13-6.

Moreover, New Jersey's added assessment procedure is unusually favorable to the taxpayer because there is no requirement that an added assessment be paid before it can be challenged on appeal to the county board of taxation. *Inwood Owner's, Inc. v. Township of Little Falls*, 216 N.J. Super. 485, 488-90, 524 A.2d 441, 443-44 (App.

Div.), *certif. denied*, 108 N.J. 184, 528 A.2d 13 (1987). Furthermore, a taxpayer challenging an added assessment must receive a decision from the county board of taxation within 30 days of the deadline for filing the appeal. *See* N.J.S.A. 54:4-63.11.

Contrary to the Petition, the Tax Court is not " 'an inferior court of limited jurisdiction' (N.J.S.A. 2A:3A-3), which is restricted in the claims it may entertain and in the relief it may provide." Petition at 3. The applicable statutory section (N.J.S.A. 2A:3A-1, not 2A:3A-3) was repealed in 1993 and replaced with N.J.S.A. 2B:13-1, which deleted the word "inferior." Even before that deletion, it was settled that the Tax Court could remedy constitutional deprivations. 11a (even before a recent amendment to the statute, which expanded the Tax Court's jurisdiction to hear any tax-related matters over which the Superior Court would have jurisdiction, the Tax Court could correct an unconstitutional assessment); *Township of West Milford v. Van Decker*, 120 N.J. 354, 361-63, 576 A.2d 881, 885-86 (1990) (plaintiffs successfully challenged imposition of property tax on federal equal protection grounds); *Weisbrod v. Township of Springfield*, 1 N.J. Tax 583, 587-88 (Tax Ct. 1980) (use of "inferior" did not affect ability of Tax Court to pass on constitutional questions). *See also* N.J.S.A. 2B:13-3a ("The Tax Court, in all causes within its jurisdiction, and subject to law, may grant legal and equitable relief so that all matters in controversy between the parties may be completely determined").

Nor does the statutory "zone of reasonableness" deprive taxpayers of relief from an unconstitutional method of valuation if the assessments do not exceed the

taxable value of their properties by more than 15%. *See* Petition at 4-5. The Tax Court's utilization of the zone of reasonableness is prescribed by N.J.S.A. 54:51A-6, concerning which the New Jersey Supreme Court has stated, in unequivocal terms:

> [I]t is axiomatic that no statute can sanction an unconstitutional practice. Accordingly, the Township's reliance on the "protective range" of Chapter 123, N.J.S.A. 54:51A-6, to permit its discriminatory-assessment practice is without merit.
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> * * *
>
> No statute can overturn the New Jersey Constitution's guarantee to its citizens that real estate "shall be assessed according to the same standard of value" or deny a citizen equal protection under the fourteenth amendment. If there is a conflict between the constitutional and statutory standards, this Court has held unequivocally that the constitutional guarantee of equality must prevail.

Township of West Milford v. Van Decker, 120 N.J. at 357, 364, 576 A.2d at 882, 886. *See also* N.J.S.A. 54:1-35a (defining terms).

For these same reasons, the presumption of correctness that applies to tax assessments when they are challenged on appeal does not absolve the Tax Court of an obligation to make its own determination of a property's true value. No presumption of correctness applies if the assessment was "derived from a patently arbitrary and capricious assessment methodology" or if it was "totally unrelated to true value." *Pantasote Co. v. City of Passaic*,

100 N.J. 408, 417, 495 A.2d 1308, 1312 (1985); *Watnong Assocs., Inc. v. Township of Morris*, 11 N.J. Tax 108, 117-18 (Tax Ct. 1990). Moreover, the New Jersey Supreme Court has made clear that the Tax Court should not treat the presumption of correctness as an insurmountable barrier. *See Glen Wall Assocs. v. Township of Wall*, 99 N.J. 265, 273-84, 491 A.2d 1247, 1251-57 (1985). *See also Ford Motor Co. v. Township of Edison*, 127 N.J. 290, 310-16, 604 A.2d 580, 590-93 (1990). Finally, for the same reasons as apply to the application of the zone of reasonableness, the presumption of correctness is not and cannot be used to sustain unconstitutional actions. *See Township of West Milford v. Van Decker*, 120 N.J. at 357, 364, 576 A.2d at 882, 886.

In the same vein, GM repeatedly raises the possibility that dismissal of §1983 claims from state court will create a risk that certain constitutional violations, such as invidious race discrimination, will go unpunished. Petition at 4-5, 9, 14. The easiest response to this argument is that this is not such a case. The New Jersey Supreme Court stated:

> We need not reach the question whether discrimination, based on race, religion, gender, or the like, could constitute a violation of a taxpayer's constitutional rights. The issue is not before us. Suffice it to state that we do not read the decisions of the United States Supreme Court as legitimizing any form of invidious discrimination. Furthermore, the Law Against Discrimination, N.J.S.A. 10:5-1 to 5-42, assures New Jersey citizens protection against any such discrimination.

12a. *See also Fair Assessment*, 454 U.S. at 107 n.4 ("We need not decide in this case whether the comity spoken of would also bar a claim under §1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race").

As the New Jersey Supreme Court recognized, New Jersey's Law Against Discrimination provides a direct and complete remedy for invidious racial discrimination. 12a. Moreover, if such discrimination were to occur, it could be challenged through New Jersey's tax system, a refund plus interest would be awarded, and "there is every reason to believe that once a [New Jersey] state appellate court has declared the tax unconstitutional the appropriate state agencies will respect that declaration." *California v. Grace Brethren Church*, 457 U.S. at 414. *See National Private Truck Council*, 115 S. Ct. at 2357 n.6. If the discriminatory conduct were repeated, then and only then might relief be appropriate under §1983. *See National Private Truck Council*, 115 S. Ct. at n.6.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

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(3)

No. 95-1930

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In the Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

CITY OF LINDEN, THE ASSESSOR OF LINDEN, AND RICHARD CHAIKEN, AGENT, SERVANT OR EMPLOYEE OF LINDEN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In opposing the petition in this case, respondents pointedly do not deny that the issues presented here are important and recurring ones.[1] They also do not deny that New Jersey provides no remedy against individual state officials who are responsible even for intentional violations of the Constitution. And they nowhere take issue with our demonstration (at Pet. 19-20) that GM's Section 1983 action will not interfere in any respect with New Jersey's system of tax administration. Instead, respondents insist that New Jersey's procedures, with all of their defects, are "adequate" as a matter of federal law. As we explain below, this contention is insupportable.

1. At the outset, we note that respondents' (largely erroneous) factual assertions are entirely beside the point. The courts below decided this case on the express assumption — agreed to by *all* of the parties at *all* levels of the proceedings — that GM's factual allegations are correct. In fact, the case was initially decided by the trial court, at respondents' insistence, on motions for summary judgment based on respondents' agreement to accept the truth of all of GM's factual allegations made in the "complaint, amended complaint, responses to interrogatories or as alluded to by GM's counsel." Memorandum of Law of Defendant, Richard Chaiken, in Support of Motion to Dismiss 1; see Reply Brief of Defendants City of Linden and the Tax Assessor of Linden in Support of Their Motion for Summary Judgment 1.

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[1] Indeed, since the petition for certiorari was filed in this case the Supreme Court of North Carolina has held that a taxpayer may proceed under Section 1983 in state court to challenge the constitutionality of a state tax. *Edward Valves, Inc.* v. *Wake County*, 471 S.E.2d 342 (N.C. 1996). In addition, another petition presenting an issue closely related to the one here is now pending before the Court. *Hogan* v. *Wisconsin Dept. of Revenue*, No. 95-1979 (filed June 7, 1996).

On the basis of this agreement by respondents, the trial court stayed discovery at a very early stage (PA 65A-66A),[2] and GM did not amend its complaint to include, among other things, the subsequent admission in 1989 by the Mayor of the City of Linden about the City's retaliatory motive for the added property tax assessment imposed on GM in 1986 (Pet. App. 33a).[3] In deciding respondents' motions for summary judgment, therefore, the trial court did not address "the merits of General Motors' factual allegations [which] have neither been briefed nor argued." PA 66A. Instead, the court accepted GM's factual allegations as true and decided only the pure questions of law raised by respondents' motions, including the question presented by the petition in this case: whether the Law Division must adjudicate GM's Section 1983 claim. PA 65A; Pet. App. 31a-33a. Both the Appellate Division and the New Jersey Supreme Court also accepted GM's factual allegations as true for purposes of deciding whether GM may bring this Section 1983 action. Pet. App. 3a, 17a.

Thus, the courts below accepted as true the following facts supporting GM's claim of unconstitutional retaliation by respondents: (1) GM "was treated in a discriminatory

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[2] GM acquiesced in the discovery stay based on the parties' agreement, and the Law Division's assurance, that respondents' motions would raise only legal — not factual — issues. The Law Division accepted GM's argument that, if the case were allowed to proceed in that court, GM "should be given the opportunity to have discovery and to brief and argue the facts which it alleges demonstrates a conspiracy and bad faith." PA 67A.

[3] In light of the agreement by respondents to accept all of GM's factual allegations made in *any* pleading or brief and the forbearance of GM in not amending its complaint in deference to respondents' proposed summary judgment motions, the suggestion now by respondents (Br. in Opp. 6) that GM's complaint was somehow deficient is both misleading and patently inappropriate.

manner with respect to [the] added assessment imposed in 1986 after its facility was gutted and remodeled;" (2) "no other property in the City was reevaluated when [GM's] facility received a new assessment and * * * this clearly demonstrates that it was improperly singled out by the City;" and (3) "the City's Mayor * * * stated [to GM representatives] that '[t]he additional increased assessment was placed on the General Motors' plant because [GM] filed the tax appeal.'" Pet. App. 32a-33a.[4]

In light of this admission by the Mayor — which must be accepted as true for purposes of deciding this case — and

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[4] In their partisan rendition of the facts (Br. in Opp. 1-4), respondents fail to acknowledge that virtually all of the renovations to GM's facility during the 12 months following August 1985 involved *nontaxable* personal property: machinery and equipment. As respondents note (Br. in Opp. 4), GM has objected to the inclusion of this nontaxable property in the calculation of the 1986 added assessment. But respondents fail to note that this was one of the bases on which GM prevailed in the Appellate Division regarding the City's 1983-1985 assessments. Indeed, respondents make the astonishing assertion (*id.* at 5) that it was "highly misleading" for GM to state (Pet. 2) that its "position was vindicated on appeal when the Appellate Division * * * reversed the Tax Court decision and remanded for reconsideration." In fact, contrary to respondents' bald assertion, the Appellate Division reversed the Tax Court's decision to include the facility's so-called "fitups, that is, its paint booths, paint ovens, conveyor assemblies, water processing system, welder water system, auto fluid fills, * * *," in its calculation of the plant's value. *General Motors Corp.* v. *City of Linden*, 13 N.J. Tax 324, 325-326 (App. Div.) (per curiam), certif. denied, 134 N.J. 561 (1993). The court held that "some, if not all, of the fitups in this case constitute excluded personal property." 13 N.J. Tax at 328. The court therefore reversed and remanded for reconsideration. *Id.* at 329. Thus, GM clearly prevailed in the Appellate Division, and respondents' contrary claim is itself "highly misleading."

longstanding precedents of this Court, no one has ever disputed (indeed, the courts below have assumed) that GM has made out a due process violation based on respondents' retaliation against it for challenging prior tax assessments. It is plainly unconstitutional for a municipality and its taxing officials to discriminate and retaliate against a taxpayer for invoking its right to appeal property tax assessments, and respondents do not contend otherwise. See *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County*, 488 U.S. 336 (1989); *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *Township of West Milford* v. *Van Decker*, 120 N.J. 354, 362-364, 576 A.2d 881, 885-886 (1990); *Baldwin Constr. Co.* v. *Essex County Bd. of Taxation*, 16 N.J. 329, 342, 108 A.2d 598, 604-605 (1954); *423 South Salina Street, Inc.* v. *City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63 (1986), cert. denied, 481 U.S. 1008 (1987).

2. GM now seeks redress for this gross constitutional violation. Under the New Jersey Supreme Court's decision in this case, however, GM is relegated to the state tax system to pursue its claim for relief. And, as we explained in the petition (at 12-19), the New Jersey tax system has three deficiencies, *each* of which renders the regime inadequate as a matter of federal law. *First*, as respondents expressly conceded below, the question in the state tax proceeding is whether the valuation number selected by the assessor fairly reflects the value of the taxpayer's property, *not* whether the assessor acted unconstitutionally in making the assessment. See Pet. 12-15. *Second*, the New Jersey statute provides that the taxpayer challenging a constitutional violation must satisfy a prohibitively high burden of proof. See Pet. 15. And *third*, New Jersey law does not provide for personal or punitive liability against an assessor or other tax official — even one who has engaged in intentionally and blatantly unconstitutional conduct — and therefore does not serve to preclude or deter repeated constitutional violations. See Pet. 16-19. Respondents assert that the first and second of these

points are inaccurate and that the third is irrelevant. Respondents plainly are incorrect on all three counts.

a. The sole object of the state tax regime is the "correction" of erroneous tax assessments. As the New Jersey Supreme Court itself observed below (Pet. App. 11a-12a), even in constitutional cases the only relief available in Tax Court is the "correct[ion] [of] an unconstitutional assessment," plus interest on any excess taxes collected.[5] And in determining whether a tax assessment is "correct," the Tax Court applies a so-called "zone of reasonableness" or "protective range," see N.J.S.A. § 54:51A-6, under which an assessment may not be "corrected" if it is within 15% of the actual taxable value of the subject property. See Pet. 4-5.

Respondents suggest, although they never affirmatively state,[6] that the "zone of reasonableness" would not apply to GM's case in the Tax Court. The New Jersey Supreme Court, however, never even hinted in its opinion below that GM would get any favorable treatment of its constitutional

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[5] Respondents cite a 1993 New Jersey statute that deleted the word "inferior" from the statutory description of the Tax Court and expanded the jurisdiction of that court (Br. in Opp. 19), but they fail to note that this statutory change is, as the Appellate Division found (Pet. App. 20a n.2), inapplicable to GM's case, which was pending when the statute was modified. Moreover, as the Appellate Division correctly noted (*ibid.*), this statutory change is irrelevant to the question of state court jurisdiction over Section 1983 actions presented by this case.

[6] Respondents quote from *Township of West Milford* v. *Van Decker*, 120 N.J. 354, 576 A.2d 881 (1990), but never actually concede that the holding of *Van Decker* would apply to GM's case in the Tax Court to preclude application of the "zone of reasonableness." In fact, as we demonstrate below (at page 6), *Van Decker* is distinguishable and the "zone of reasonableness" would apply to GM's case.

claim in this regard from the Tax Court.[7] Indeed, the court went to great lengths to explain how the usual procedures applicable in all tax cases would apply in GM's case and provide GM with an adequate remedy. Pet. App. 11a-13a.

The New Jersey Supreme Court's decision in *Township of West Milford* v. *Van Decker*, 120 N.J. 354, 576 A.2d 881 (1990), is not to the contrary. In that case, the township and its assessor had *no* authority to impose *any* new assessment at all on the taxpayer's property. 120 N.J. at 357, 364, 576 A.2d at 882, 886.[8] The New Jersey Supreme Court held that the statutory "zone of reasonableness" would not protect an assessment where there was no municipal authority to make *any* assessment. *Ibid.* In such cases, the actual amount of the assessment was irrelevant.

In this case, by contrast, GM concedes that the City of Linden has authority to impose an added assessment based on additions to GM's facility. GM anticipated that the added assessment would be approximately $1 million. Instead, the added assessment was over $17 million. Thus, the amount of the assessment is at issue in the Tax Court, and the "zone of reasonableness" will apply, as it does in all cases in which the actual *amount* of an assessment is at issue, as opposed to the municipality's authority to make any assessment at all.

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[7] No one — and particularly not respondents — has ever suggested in the Tax Court proceedings involving GM's challenge to the 1986 added assessment, or elsewhere, that the "zone of reasonableness" might not apply to GM's challenge to that added assessment. Respondents apparently have crafted their argument carefully in this Court so as to preserve the claim in the Tax Court that the "zone of reasonableness" applies to GM's case.

[8] The township in *Van Decker* established an illegal "practice of reassessing only properties that were the subject of a recent sale while leaving undisturbed the appraised valuations of properties in the same class." 120 N.J. at 357, 576 A.2d at 882.

b. As for the extraordinarily high burden of proof imposed on taxpayers in the Tax Court, respondents argue that it will not apply in GM's case (Br. in Opp. 20-21). The New Jersey Supreme Court, however, has already held that it will apply (Pet. App. 12a): in the Tax Court, GM must "introduce evidence to overcome the presumptive validity of the assessment." And, as we have explained in the petition (at 5), GM faces a daunting task in trying to overcome this presumption. "The strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be 'definite, positive and certain in quality and quantity to overcome the presumption.'" *Pantasote Co.* v. *City of Passaic*, 100 N.J. 408, 413, 495 A.2d 1308, 1310 (1985) (quoting *Aetna Life Ins. Co.* v. *Newark*, 10 N.J. 99, 105, 89 A.2d 385, 387 (1952)).

c. In advancing the spurious contentions that neither the "zone of reasonableness" nor the heightened burden of proof will apply to GM's case in the Tax Court, respondents' tactic is clear: they hope to defeat review by obscuring the meaning of New Jersey law. This stratagem should not succeed. We demonstrated in the petition (at 21) — and respondents do not deny — that features of the sort we describe are found in state tax regimes across the Nation. As a consequence, whether such tax schemes are "adequate" and therefore preclude recourse to Section 1983 is an important and recurring issue, which this Court left open in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995). Allowing a taxing jurisdiction to avoid review of this issue by the simple expedient of manufacturing a wholly chimerical dispute about the meaning of state law would assure the frustration of federal rights.

d. Finally, respondents declare it irrelevant that New Jersey does not provide for personal liability against tax assessors who maliciously and knowingly engage in unconstitutional acts; they maintain that a state remedy

necessarily is adequate so long as it provides for refunds. Br. in Opp. 11-18. The decisions they cite for this proposition, however, are simply not on point.

The recent state court decisions relied upon by respondents (Br. in Opp. 17-18) are inapplicable because the taxpayers in those cases did not seek damages for intentional constitutional violations by state tax officials. The decisions of this Court cited by respondents are equally off the mark:

- *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981), cited at Br. in Opp. 8-10, 12, expressly did *not* address the adequacy of the state remedy, and expressly *did* observe (with evident approval) that the state courts would entertain a Section 1983 action to redress constitutional violations almost identical to those alleged here. 454 U.S. at 106, 116-117.

- The Court held in *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981), cited at Br. in Opp. 13-14, that a state system that failed to pay interest on refunds was adequate because Congress was aware when it passed the Tax Injunction Act that many "States did not pay interest on their refunds to taxpayers, following the then-familiar rule that interest in refund actions was recoverable only when expressly allowed by statute." 450 U.S. at 523. In contrast, we explained in the petition (at 18) that pre-Section 1983 law regarded the availability of an action against individual taxing officers as an important part of the adequate legal remedy that precluded injunctive relief. Respondents make no response.

- *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), cited at Br. in Opp. 14-15, was an action for declaratory relief, did not involve a request for damages, and did not suggest that damages against individual taxing officials would be unavailable.

- *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), cited at Br. in Opp. 15, has nothing whatsoever to do with the issue in this case; it

addressed the question whether federal due process principles require states to refund unconstitutional taxes.

- Respondents read *National Private Truck Council* to hold that "a refund is an adequate legal remedy unless a state's tax authorities continue to impose the unconstitutional tax." Br. in Opp. 16. We explained in the petition (at 11), however, that *National Private Truck Council* had no occasion to address the nature of the adequacy requirement. Indeed, the taxpayer in *National Private Truck Council* sought only declaratory and injunctive relief, and the Court's decision rested in part on "principles of equitable restraint" that have no bearing here. 115 S. Ct. at 2356. In addition, as we already have explained, the pre-Section 1983 decisions upon which the Court principally relied in *National Private Truck Council* recognized the importance of actions against individual tax assessors; respondents make no response to this important point.

e. At the end of the day, respondents are left with the half-baked assertion that their adequacy principle might not preclude Section 1983 claims challenging discrimination on the basis of race or other impermissible factors. Br. in Opp. 21-22. But there is absolutely no reason to believe that this is so. In such a case the taxpayers could assert their constitutional claims in the Tax Court and (if the "zone of reasonableness" limit did not apply) could obtain a refund, just as GM can here. Under respondents' theory, that is the very definition of adequacy. See Br. in Opp. 11. The suggestion that the adequacy of the state remedy nevertheless somehow varies depending upon the nature of the taxpayer's constitutional claim is a wholly illogical one that finds no support in this Court's decisions.

Indeed, that respondents feel the need to float the possibility at all stands as a tacit and embarrassing admission that a state tax refund regime is *not* adequate, and is *not* a permissible substitute for Section 1983, when it fails to punish and deter intentional violations of the Constitution.

Because the New Jersey scheme plainly suffers from this defect, further review of this important issue is in order.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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